Jurisdictional Statement

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In the Supreme Court of the United States

OCTOBER TERM, 1981

RAYMOND J. DONOVAN, SECRETARY OF LABOR, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether, under the doctrine of intergovernmental immunity recognized in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the minimum wage and overtime provisions of the Fair Labor Standards Act may constitutionally be applied to the employees of a publicly owned and operated mass transit system.

PARTIES TO THE PROCEEDING BELOW

In addition to the appellee named in the caption, the appellees include the American Public Transit Association and Joe G. Garcia.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The district court issued no opinion. The judgment of the district court (App. A, *infra*, 1a-3a), which embodies the court's conclusions of law, is not reported.

JURISDICTION

The judgment of the district court (App. A, *infra*, 1a-3a) was entered on November 17, 1981. A notice of appeal to this Court (App. B, *infra*, 4a-5a) was filed on December 17, 1981. On February 4, 1982, Justice White extended the time for docketing the appeal to and including March 17, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. See *Donovan* v. *Richland County Association for Retarded Citizens*, No. 81-255 (Jan. 11, 1982).[1]

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[1] Out of an abundance of caution, the Secretary of Labor filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit as well. The Secretary moved that court to stay all

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant provisions of the Constitution, the Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. III) 201 *et seq.*, and the Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. III) 1601 *et seq.*, are set forth in Appendix C, *infra*, 6a-12a.

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. (& Supp. III) 201 *et seq.*, requires employers covered by the Act to pay their employees a minimum hourly wage and to pay them at no less than one and one-half times their regular rate of pay for hours worked in excess of 40 during a workweek. See 29 U.S.C. (& Supp. III) 206(a)(1) and 207(a)(1). The original FLSA excluded employees of states and their political subdivisions from the coverage of the Act. See 29 U.S.C. (1940 ed.) 203(d).[2] In 1966, Congress extended the coverage of the FLSA in various respects and eliminated the previously applicable exemption as to virtually all employees of hospitals, institutions, and schools operated by the states and their subdivisions, whether operated for profit or on a nonprofit basis, that were deemed to be "enterprise[s] engaged in commerce or in the production of goods for commerce." Pub. L. No. 89-601, Section 102(a), (b), and (c), 80 Stat. 831, 29 U.S.C. (1970 ed.) 203(d), 203(r)(1), 203(s)(4).[3]

The constitutionality of the "enterprise concept" of coverage and of the inclusion of publicly operated schools,

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appellate proceedings pending this Court's disposition of this appeal. The court of appeals has granted the requested stay.

[2] The cited provision excluded states and their political subdivisions from the definition of an "employer" used in the minimum wage and overtime provisions of the FLSA.

[3] The effect of each of these provisions and their interrelationship is explained in *Maryland* v. *Wirtz*, 392 U.S. 183, 185-187 & n.4 (1968).

hospitals and institutions was sustained in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968).[4] In addition to schools, hospitals and institutions, the 1966 FLSA amendments extended coverage to employees of all transit companies, whether private or public, that were "engaged in commerce." Pub. L. No. 89-601, Section 102(a), (b), 80 Stat. 831, 29 U.S.C. (1970 ed.) 203(d), 203(r)(2).[5] However, only minimum wage, and not overtime pay, protection was provided for drivers, operators, and conductors ("operating employees"). Pub. L. No. 89-601, Section 206(c), 80 Stat. 836, 29 U.S.C. (1970 ed.) 213(b)(7). *Maryland* v. *Wirtz* did not involve a challenge to the extension of FLSA protection to public transit employees. See 269 F. Supp. 826, 827 (D. Md. 1967), aff'd, 392 U.S. 183 (1968).

In 1974, Congress again broadened the coverage of the FLSA to include virtually all public agencies and their employees. Pub. L. No. 93-259, Sections 6(a)(1), (4), (5), (D) and (E), (6), 88 Stat. 58-60, 29 U.S.C. 203(d), 203(r)(3), 203(s)(5), 203(x).[6] The 1974 amendments also phased out the special exclusion from overtime coverage of public transit operating personnel established

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[4] The Court declined to consider, however, the statutory question whether publicly owned schools, hospitals and institutions characteristically are "engaged in commerce * * *" and are, accordingly, subject to the minimum wage and overtime provisions of the Act, leaving that question open for case by case resolution. *Maryland* v. *Wirtz*, *supra*, 392 U.S. at 200-201.

[5] Section 203(d) was amended to bring transit employees employed by a state or local government within the Act's definition of "employer." Section 203(r)(2) makes clear that transit operations are "enterprise[s]" within the meaning of the FLSA and, accordingly, that employees of a transit company engaged in commerce are entitled to the protections of the Act.

[6] These provisions and their combined effect are described in *National League of Cities* v. *Usery*, 426 U.S. 833, 838-839 (1976).

by the 1966 amendments. Pub. L. No. 93-259, Section 21(b)(1)(3), 88 Stat. 68.

The 1974 amendments were broadly challenged by the states and their political subdivisions. In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), this Court overruled *Maryland* v. *Wirtz*, *supra*, and restricted Congress' power to extend the protections of the FLSA to public employees. The Court held that the "constitutional doctrine of intergovernmental immunity" (*id.* at 837) bars application of the minimum-wage and overtime provisions of the FLSA to "the States *qua* States" (*id.* at 847), "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions * * *" (*id.* at 852).[7]

In overruling *Maryland* v. *Wirtz*, *supra*, the Court specified that the publicly operated "schools and hospitals involved in *Wirtz* * * * each provide[] an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens." 426 U.S. at 855 (footnote omitted). The Court also listed "such areas as fire prevention, police protection, sanitation, public health, and parks and recreation" as other examples of traditional state operations. *Id.* at 851, 855. However, the Court did not purport to offer "an exhaustive catalogue of [those] * * * activities * * * which are well within the area of traditional operations of state and local governments" and that accordingly may not be subject to federal commerce power legislation, where other elements of the test for immunity are satisfied. *Id.* at 851 n.16.

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[7] Justice Blackmun joined the Court's opinion on the understanding that "it adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." 426 U.S. at 856.

Although the Court thus left unsettled the status of federal legislation affecting a broad range of state governmental functions, it made clear that not all state activity was insulated from the reach of federal commerce power enactments. Indeed, the Court singled out one activity as outside the scope of the Tenth Amendment's protection: a state's "operation of a railroad engaged in 'common carriage by rail in interstate commerce * * *.'" *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 854 n.18, quoting *United States* v. *California*, 297 U.S. 175, 182 (1936). The Court commented that "California's activity [in operating a railroad] was not in an area that the States have regarded as integral parts of their governmental activities." 426 U.S. at 854 n.18.

On remand for entry of an order implementing this Court's *National League of Cities* decision, the three-judge district court concluded that this Court's decision was "limited to invalidating regulation, under the commerce clause, of the hours and wages of those state and local government employees engaged in activities integral to and traditionally provided by government." *National League of Cities* v. *Marshall*, 429 F. Supp. 703, 705 (D.D.C. 1977). Recognizing the existence of "a gray area, which will require elucidation in the factual settings presented by future cases" (*id.* at 706), and troubled by the possibility that double damages could be sought against state and local governments for FLSA violations (see 29 U.S.C. (Supp. III) 216(b) and (c)), the court concluded that "[i]t may be appropriate to provide some protection to the state and local governments" (429 F. Supp. at 706). In response to the court's request, the Secretary of Labor submitted a proposal to amend his FLSA enforcement policy statement, 29 C.F.R. Part 775, so as to provide for listing of governmental activities deemed to lie outside the scope of the states' Tenth Amendment immunity from application of the FLSA, and forswearing any intention to seek double damages for violations as to any period prior to the listing of an activity

as covered by the Act. The Secretary's proposal was approved by the district court (*National League of Cities* v. *Marshall, supra*, 429 F. Supp. at 706) and published as an interpretive regulation. See 42 Fed. Reg. 32253 (1977), codified at 29 C.F.R. 775.2(b), (d), and 775.3(b). Pursuant to the approved procedure, on December 21, 1979, the Secretary of Labor amended the statement of enforcement policy to include local mass transit systems in the category of government activities not integral to a traditional government function and hence subject to the FLSA. 44 Fed. Reg. 75630, codified at 29 C.F.R. 775.3(b)(3).

2. Appellee San Antonio Metropolitan Transit Authority ("SAMTA"), is a regional transit authority created pursuant to Tex. Rev. Civ. Stat. Ann. art. 1118x (Vernon Cum. Supp. 1981) to serve the San Antonio metropolitan area. SAMTA began operations on March 1, 1978, when it acquired the facilities and equipment of the city-owned San Antonio Transit System, which had begun operations in 1959. Prior to 1959 public transportation in San Antonio was provided by a private transit company.

During its brief existence, SAMTA has received substantial federal financial assistance, in the form of grants in aid for capital improvements and operating expenses, as well as technical assistance, under the Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. III) 1601 *et seq.* ("UMTA"). During the first two fiscal years of SAMTA operations, UMTA provided non-capital grants of approximately $12.5 million, or 30% of SAMTA's total operational expenses and 40% of its operational deficit.[8] SAMTA's predecessor, the San Antonio Transit System, had also received substantial federal financial aid, prior to the SAMTA takeover. During the period December 1970 through February 1980, SAMTA and its predecessors received $51,689,000 in federal grants, or approximately 40% of its total eligible project costs of

[8] Brief in Support of SAMTA's Motion for Summary Judgment at 10.

$130,922,194. Of this federal assistance $31,040,080 represented capital grants under Sections 3 and 5 of UMTA; $20,620,270 was operating assistance under Section 5; and $28,654 was technical assistance (research, development, and demonstration grants) under Section 6 of UMTA.[9] SAMTA also has one of DOT's major funding commitments for bus acquisition.[10]

3. On November 21, 1979, SAMTA filed a complaint seeking a declaratory judgment that its operations are integral operations of a political subdivision of the State of Texas in an area of traditional governmental functions, and accordingly exempt, under the rule of *National League of Cities*, from both the minimum wage and overtime provisions of the FLSA.[11] The Secretary of Labor counterclaimed against SAMTA for enforcement of the overtime and recordkeeping provisions of the Act. See 29 U.S.C. 217.[12] The American Public Transit Association ("APTA"), a trade association of public transit operators, intervened as a plaintiff, supporting SAMTA, while Joe G. Garcia, a SAMTA employee, intervened as a defendant, supporting the Secretary.

On November 17, 1981, the district court denied the Secretary's motion for partial summary judgment and entered judgment for SAMTA. The court issued no opinion, but its judgment recited (App. A, *infra*, 2a):

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[9] UMTA, Office of Management Information Systems, List of All Grants for the City of San Antonio, Texas (Feb. 25, 1980) (Exhibit K to Defendant's Motion for Summary Judgment).

[10] UMTA, Major Funding Commitments for Buses Since Feb. 1965, as of Sept. 30, 1979 (Exhibit L to Defendant's Motion for Summary Judgment).

[11] SAMTA's complaint (¶¶ 4-6), filed just before the Secretary published his enforcement policy respecting mass transit, alleged that the Secretary had informally concluded that mass transit operations were not within the sphere of intergovernmental immunity, and that employees of SAMTA had, on this basis, begun to assert a right to receive overtime compensation under the FLSA, and had indicated their intention to seek remedial relief under the Act.

[12] SAMTA evidently paid its employees the minimum wage at the time in question.

That local public mass transit systems (including San Antonio Metropolitan Transit Authority) constitute integral operations in areas of traditional governmental functions under the decision of the United States Supreme Court in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), and that the Secretary of Labor of the United States cannot apply or seek to enforce the minimum wage and overtime pay provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.*, against local mass transit systems in the United States, including San Antonio Metropolitan Transit Authority * * *.[13]

THE QUESTION IS SUBSTANTIAL

This case presents an important question concerning the authority of Congress to require maintenance of reasonable conditions of employment for a substantial class of working men and women employed by enterprises in interstate commerce. The question presented—whether application of the Fair Labor Standards Act to publicly owned mass transit systems is barred by the constitutional doctrine of intergovernmental immunity—is but one of a host of similar questions that have arisen in the wake of this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976).

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[13] The district court added (App. A, *infra*, 2a):

> [T]he "Final Interpretation" issued by the Wage and Hour Division of the United States Department of Labor on December 21, 1979 (44 Fed. Reg. 75628-75630) is null and void insofar as it lists local public mass transit systems as not being integral operations in areas of traditional governmental functions under *National League of Cities* v. *Usery*, *supra* * * *.

Although the judgment on its face does not appear to encompass injunctive relief, the Secretary sought and secured from the district court on January 19, 1982, a stay of "that portion [of the] judgment that *enjoins* [him] from applying or seeking to enforce the minimum wage and overtime pay provisions of the Fair Labor Standards Act * * * against local mass transit systems in the United States other than plaintiff San Antonio Metropolitan Transit Authority" (emphasis added).

Several significant features of the mass transit industry make plenary review particularly appropriate here. In striking down the federal statute, the district court extended the doctrine enunciated in *National League of Cities*, so as to shield from reasonable federal commerce power legislation an activity—local transportation—that is not within the range of traditional governmental functions. Moreover, although there has been a marked shift toward public sector operation of mass transit in recent years, that shift was significantly assisted and accelerated by the availability for this purpose of substantial federal grants under the Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. III) 1601 *et seq.* Finally, in entering the field of mass transportation the states and their subdivisions have chosen to enter into a form of commerce already subject to federal legislation governing significant aspects of the employment relation.

Each of these factors serves to distinguish this case from *National League of Cities* itself, and highlights the district court's departure from the teaching of that case. The question whether the FLSA may constitutionally be applied to public mass transit systems is the subject of substantial litigation in the lower courts, and is currently pending in at least three courts of appeals.[14] For these reasons, and because the district court's decision

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[14] Compare *Joiner* v. *City of Macon*, Civ. Action No. 79-287-MAC (M.D. Ga. Apr. 27, 1981), appeal pending, No. 81-7789 (11th Cir.) (upholding FLSA as applied), with *Alewine* v. *City Council of Augusta, Georgia*, 505 F. Supp. 880 (S.D. Ga. 1981), appeal pending, No. 81-7490 (11th Cir.); *Dove* v. *Chattanooga Area Regional Transportation Authority*, Civ.-1-80-249 (E.D. Tenn. July 21, 1981), appeal pending, No. 81-5636 (6th Cir.); and *Kramer* v. *New Castle Area Transit Authority*, Civ. Action No. 80-1008G (W.D. Pa. June 11, 1981), appeal pending, No. 81-2223 (3d Cir.) (each holding FLSA unconstitutional as applied). Because the United States was not a party to any of these cases during district court proceedings, the appeals are within the jurisdiction of the courts of appeals under 28 U.S.C. 1291 and 28 U.S.C. 1292(b). Compare *Donovan* v. *Richland County Association for Retarded Citizens*, No. 81-255 (Jan. 11, 1982).

holding the Act unconstitutional in this setting threatens to deprive a substantial number of employees of the protections that Congress has established, review by this Court is warranted.[15]

1. In *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 852 (emphasis added), this Court held that the 1974 amendments to the Fair Labor Standards Act that extend minimum wage and overtime protection to virtually all public employees are unconstitutional "insofar as [they] operate to directly displace the States' freedom to structure integral operations in areas of *traditional* governmental functions."[16] Although the Court provided no "exhaustive catalogue" of activities considered within the "traditional operations of state and local government" (*id.* at 851 n.16), it did list fire prevention, police protection, sanitation, public health, parks, recreation, schools and hospitals as protected. *Id.* at 851, 855. On the other hand, the Court noted that operation of a railroad in interstate commerce is not within the states' intergovernmental immunity because it is "not in an area that the States have regarded as integral parts of their govern-

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[15] A question related to that presented here is pending before the Court in *United Transportation Union* v. *Long Island R.R.*, No. 80-1925 (argued Jan. 20, 1982). However, we have argued in that case that the constitutionality of the Railway Labor Act, 45 U.S.C. 151 *et seq.*, as applied to employees of a state-owned railroad, does not turn on whether public mass transit operations are constitutionally immune from the Fair Labor Standards Act, and, accordingly, that the Court need not decide the question presented in this case in No. 80-1925.

[16] The Court repeatedly characterized the state activities upon which the federal legislation was deemed impermissibly to intrude as "traditional." See, *e.g.*, 426 U.S. at 849 ("[t]he degree to which the FLSA amendments would interfere with traditional aspects of state sovereignty can be seen * * *"), 851 & n.16 ("activities * * * within the area of traditional operations of state and local governments" and "services * * * which the States have traditionally afforded their citizens"), 855 ("those governmental services which the States and their political subdivisions have traditionally afforded their citizens").

mental activities." 426 U.S. at 854 n.18.[17] Accordingly, it is clear that only those activities that, in light of history, fairly may be considered " 'essential to [the] separate and independent existence' " (*id.* at 845, quoting *Coyle* v. *Oklahoma*, 221 U.S. 559, 580 (1911), and *Lane County* v. *Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869)) of the states are shielded from the reach of federal commerce power legislation.[18]

Contrary to the decision below, provision of mass transit services, unlike public education, safety, health, sanitation, parks, schools and hospitals, is not a traditional and integral government function. Rather, until the 1960's mass transit had been predominantly part of the private sector. At the time of World War II, only 20 street railways and bus systems, carrying 7% of the nation's transit riders, were in public ownership. American

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[17] The Court thus reaffirmed the vitality of the holdings in *United States* v. *California*, 297 U.S. 175 (1936); *Parden* v. *Terminal Ry.*, 377 U.S. 184 (1964); and *California* v. *Taylor*, 353 U.S. 553 (1957).

[18] Just last Term the Court recapitulated the holding of *National League of Cities* in *Hodel* v. *Virginia Surface Mining & Reclamation Association*, No. 79-1538 (June 15, 1981). The Court stated (slip op. 21 (footnote omitted; emphasis in original)):

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." [426 U.S.] at 854. Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." *Id.* at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions." *Id.* at 852.

Even where these three requirements are met, a Tenth Amendment challenge to legislation under the Commerce Clause may still fail, because "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies State submission." *Hodel* v. *Virginia Surface Mining & Reclamation Association*, *supra*, slip op. 21 n.29.

Public Transit Association, *Transit Fact Book 1981*, at 27.[19] In 1960, only 64 of the 1251 transit systems extant were publicly owned. *Urban Mass Transportation Act of 1963: Hearings on H.R. 3881 Before the House Comm. on Banking and Currency*, 88th Cong, 1st Sess. 27 (1963) (testimony of Robert Weaver). At that time, mass transit was still a private enterprise in many of our nation's largest cities, including Atlanta, Baltimore, Buffalo, Cincinnati, Dallas, Denver, Houston, Milwaukee, Minneapolis, New Orleans, Pittsburgh, St. Louis, San Diego and Washington, D.C. *Id.* at 313 (testimony of George W. Anderson, Executive Vice President, American Transit Association). To be sure, subsequent to the enactment of the Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. III) 1601 *et seq.* (see pages 6-7, *supra* and pages 15-16, *infra*), the trend toward public ownership of transit has substantially accelerated. By 1967 over 50% of all transit riders patronized publicly owned systems. *Transit Fact Book 1981* 27. The latest available information is that slightly over half the operating systems, carrying over 94% of the riders, are now publicly owned.[20] However, many of the cities that have acquired transit systems

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[19] The 1978-1979 edition of the same reference cites the figure of 35 systems in public ownership, but does not vary the percentage of riders carried. *Transit Fact Book* 55 (1978-1979 ed.). We note with interest that APTA, without material revision in the underlying historical data, has revised its assessment of these facts. The earlier edition of the *Transit Fact Book* concludes that "[p]ublic ownership of transit is a recent development" (*ibid.*). The 1981 edition reverses that judgment, stating: "Public ownership of transit is not a recent development." *Transit Fact Book 1981, supra*, at 27.

[20] As late as 1981, 336 of the nation's 686 urban mass transit systems and 91 of 339 systems in rural areas were still privately owned. U.S. Department of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas Over 50,000 Population* 19 (Aug. 1981); U.S. Department of Transportation, *A Directory of Regularly Scheduled Fixed Route, Local Rural Public Transportation Service* 13 (Feb. 1981).

have contracted out responsibility for operation of these systems to private transit management companies, which are in some cases the very companies that previously owned the systems. Of the 350 publicly owned systems in urbanized areas, more than 123 (including some of the larger systems) are privately managed.[21] As these statistics indicate, mass transit cannot be deemed "an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens" (*National League of Cities* v. *Usery*, *supra*, 426 U.S. at 855 (footnote omitted)).

Not only is the district court's decision inconsistent with the definition given to the intergovernmental immunity doctrine in *National League of Cities*, it is irreconcilable with other decisions of this Court in the area of federal-state relations. The Court has affirmed that "by engaging in the railroad business a State cannot withdraw the railroad from the power of the federal government to regulate commerce." *Parden* v. *Terminal Ry.*, *supra*, 377 U.S. at 192 n.10, quoting *New York* v. *United States*, 326 U.S. 572, 582 (1946) (opinion of Frankfurter, J.); see also *Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 424 (1978) (opinion of Burger, C.J.) ("[T]he running of a business enterprise is not an integral operation in the area of traditional government functions."); cf. *Ball* v. *James*, 451 U.S. 355, 366-367 (1981).

New York v. *United States*, *supra*, was one of a series of decisions by this Court upholding the application of the federal taxing power to state enterprises that are outside the traditional scope of governmental functions. See *Massachusetts* v. *United States*, 435 U.S. 444, 457 (1978) (opinion of Brennan, J., collecting cases). In *National League of Cities*, the Court rejected the earlier reasoning of *United States* v. *California*, *supra*, to the

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[21] U.S. Department of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas Over 50,000 Population*, *supra*, at 19.

effect that "the activities in which the states have traditionally engaged [which have been held to] mark[] the boundary of the restriction upon the federal taxing power" do not supply a like "limitation upon the plenary power to regulate commerce." 426 U.S. at 854, quoting 297 U.S. at 185. But nothing in *National League of Cities* suggests that the power to regulate commerce is *more* limited than the power to tax. See 426 U.S. at 843-844 n.14. And in *Helvering* v. *Powers*, 293 U.S. 214 (1934), this Court held that the Board of Trustees of the Boston Elevated Railway Company, a quasi-public street railway enterprise, could not share in the intergovernmental tax immunity of the State of Massachusetts. The Court's reasoning in *Powers* (*id.* at 227) is fully applicable here:

> [T]he State, with its own conception of public advantage, is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the State. * * * [These circumstances] cannot be said to furnish a ground for immunity.[22]

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[22] SAMTA entered into operations in 1978, and assuredly cannot be considered a traditional integral aspect of Texas government that is essential to State sovereignty. Nor does the fact that SAMTA's immediate predecessor, the San Antonio Transit System, was publicly owned since 1959 call for any different result here. First, public ownership in San Antonio had been in existence for only a short time when, in 1966, important provisions of the FLSA became applicable to mass transit. This situation is to be contrasted with the elimination, in 1974, of the longstanding FLSA exemption covering other state and local government employees performing tasks that have been within the public sector for far longer. Second, we submit that the assumption, by a distinct minority of jurisdictions, of a function generally regarded as a private sector activity at the time federal legislation affecting that activity is enacted cannot be deemed sufficient to establish immunity from the federal legislation.

2. Even if the recent growth of public ownership of mass transit systems were sufficient, if viewed in isolation, to suggest that these activities have become an essential attribute of state sovereignty, the circumstances in which that shift took place militate against extension of the doctrine of intergovernmental immunity to appellee SAMTA and other publicly owned mass transit systems.

a. The recent conversion of transit systems from private to public ownership was by no means a local phenomenon. Rather, that shift followed enactment of the Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. III) 1601 *et seq.*, which made available substantial federal financing for public acquisition of private systems and construction of new systems and facilities, and for the operation of the resulting systems. By 1964 Congress had recognized the "deterioration or inadequate provision of urban transportation facilities and services * * *" (49 U.S.C. 1601 (a)(2)), and had concluded that "[m]ass transportation needs have outstripped the present resources of the cities and States, and [that] a nationwide program can substantially assist in solving transportation problems." H.R. Rep. No. 204, 88th Cong., 1st Sess. 4 (1963). UMTA established a framework "to provide assistance to State and local governments and their instrumentalities in financing [mass transit] systems, to be operated by public or private mass transportation companies as determined by local needs." 49 U.S.C. 1601(b)(3). Under the provisions of UMTA, local government bodies with transit responsibilities are eligible to receive federal grants defraying as much as 80% of their capital outlays, including the costs of acquiring local private systems and making capital improvements in them, and up to 50% of their operating expenses. 49 U.S.C. (& Supp. III) 1603(a), 1604(e). By 1978 more than $13 billion in federal aid to transit had been awarded under UMTA and other federal programs. *Transit Fact Book* 57 (1978-

1979 ed.).[23] As indicated above (pages 6-7), both SAMTA and its predecessor, the San Antonio Transit System, were beneficiaries of substantial federal financial assistance.

The enactment of UMTA heralded the substantial expansion of the state and local governmental role in providing urban transit described above (pages 11-13). Although it is impossible to state with assurance what would have happened had federal funding not been made available, there is reason to believe that many cities would not have entered the transit business; certainly they had not generally undertaken to perform that service before the arrival of federal financing.[24]

Thus, the transfer of responsibility for providing local transit service represents not an integral aspect of state or local government, but a classic venture in "cooperative federalism" into which the states and their subdivisions are free to, but are not compelled to, join. See *Hodel* v. *Virginia Surface Mining & Reclamation Association*, No. 79-1538 (June 15, 1981), slip op. 22-23; *In re Glidden*, 653 F.2d 85, 88 (2d Cir. 1981), cert. denied, No. 81-565 (Jan. 11, 1982). It would be peculiar indeed if a private activity in interstate commerce that is assumed by local government largely due to substantial federal financial

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[23] Through September 1976, some 115 cities had used UMTA funds to acquire local private bus systems. F. Siskind and E. Stromsdorfer, *The Economic Cost Impact of the Labor Protection Provisions of the Urban Mass Transportation Act of 1964* at 9-11 (May 1978).

[24] We do not suggest that the mere fact that federal funds are used in connection with the provision of transit service by local governments is sufficient to render *National League of Cities* inapplicable. To be sure, various sources of federal funds are available for education, public safety and public health. Nonetheless, these other services were provided by local governments long before federal assistance became available, whereas transit was for the most part adopted by local governments only after, and presumably in large part because, federal funding covering the major share of the expense became available.

assistance were to be deemed, as a result, beyond the constitutional reach of the federal commerce power.[25] Accordingly, this is one of the "situations in which the nature of the federal interest advanced may be such that it justifies State submission." *Hodel* v. *Virginia Surface Mining & Reclamation Association*, *supra*, slip op. 21 n.29; *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 852-853, reaffirming *Fry* v. *United States*, 421 U.S. 542 (1975).

b. The relatively recent advent of substantial public ownership in the mass transit industry serves to differentiate public transit from the governmental activities addressed in *National League of Cities* in yet another respect. The states and their subdivisions had entered the fields of police and fire protection, public health and sani-

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[25] The federal role in mass transit was not limited to incentives for the substitution of public agencies for private companies, or for the modernization of existing systems. Prior to the enactment of UMTA, "[a]s suburban development increased, the tendency was for each community to maintain its political and fiscal individuality and shun comprehensive urban transportation planning." American Public Works Association, *History of Public Works in the United States 1776-1976* at 178 (1976). UMTA, however, was intended to "encourage the planning and establishment of *areawide* urban mass transportation systems." 49 U.S.C. 1601(b)(2) (emphasis added). Congress made funding available for a project only if it was designed as part of a comprehensive area-wide plan, meeting federal criteria for improved transportation, and provided that grants could only be made to public agencies that have the legal and financial authority to carry out such projects. See 49 U.S.C. (Supp. III) 1602(a)(2)(A), 1604(b), 1604(g), 1607; H.R. Rep. No. 204, 88th Cong., 1st Sess. 14 (1963). By means of these requirements, local governments were induced, in many instances for the first time, to band together and to create metropolitan transit systems spanning the entire urban area. For example, appellee SAMTA was created in 1978, pursuant to Texas Rev. Civ. Stats. Ann. art. 1118x (Vernon Cum. Supp 1981), which authorized creation of metropolitan area-wide transi. authorities. Article 1118x was first enacted in 1973. Thus, far from being integral to state and local governments, the very shape of transit systems as they exist today is largely the product of federal policy.

tation services, hospitals and schools long before the enactment of federal legislation governing terms of employment. And for more than 30 years after the FLSA was adopted Congress recognized the prerogatives of the states in these spheres. The vice of the 1974 amendments to the FLSA thus was the abrupt federal intrusion affecting settled patterns of local and state government administration. See 426 U.S. at 845-852.

In contrast, the employment relationships in the private transit industry had long been the subject of explicit federal regulation when, in the 1960's, local governments began in large numbers to acquire transit systems. The nation's basic labor-management relations statute, the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, enacted in 1935, applies to the private transit industry just as it does to other industries affecting commerce. See *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383 (1951); *Bus Employees* v. *Missouri*, 374 U.S. 74 (1963).[26] Moreover, as Congress expanded the scope of national labor legislation, it applied a broad range of federal laws to the private transit industry, including the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. 401 *et seq.* (reporting requirements); the Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, Section 2(c), 75 Stat. 65-66, 29 U.S.C. (1964 ed.) 203(r)(2) and (s)(2), (minimum wage and child labor standards); the Equal Pay Act of 1963, 29 U.S.C. 206(d) (equal pay for women for equal work); Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (prohibition against employment discrimination on the basis of race, sex, creed, or national origin); and the Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, Sections 102(a), 206(c), 80

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[26] In *Bus Employees* v. *Wisconsin Board*, *supra*, 340 U.S. at 397-398, the Court rejected the claim that the substantial local interest in the affairs of a private bus company, operated as a public utility under state regulation, precluded application of the National Labor Relations Act to a labor dispute between the utility and its employees, explaining "these questions are for legislative determination" (*id.* at 397).

Stat. 831, 836, 29 U.S.C. (1970 ed.) 203(r)(2), 213(b)(7) (minimum wage; overtime pay for non-operating employees). These statutes reached the majority of all transit systems, 90% of which, in 1967, were still privately owned. *Transit Fact Book*, *supra*, at 38. The statutes obviously continue to apply in the substantial share of the industry that remains in private hands. Because of the significant federal regulatory presence in the private transit field at the time most state and local governments entered the field, by deciding to operate a mass transit system a municipality "subjects itself to that regulation." *Parden* v. *Terminal Ry.*, 377 U.S. 184, 196 (1964); *New York* v. *United States*, *supra*, 326 U.S. at 582 (opinion of Frankfurter, J.); cf. *Helvering* v. *Powers*, *supra*, 293 U.S. at 227.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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MARCH 1982

Appendix

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA 79 CA 457

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
PLAINTIFF

and

AMERICAN PUBLIC TRANSIT ASSOCIATION,
PLAINTIFF-INTERVENOR

v.

THE HONORABLE RAYMOND J. DONOVAN,
SECRETARY OF LABOR OF THE UNITED STATES,
DEFENDANT

and

JOE G. GARCIA, DEFENDANT-INTERVENOR

JUDGMENT

This cause was heard by this Court on September 10, 1981, upon motions for summary judgment filed by San Antonio Metropolitan Transit Authority and American Public Transit Association and motions for partial summary judgment filed by the Secretary of Labor and Joe G. Garcia. The Court has carefully considered the motions, briefs, affidavits and other material on file in this cause and the arguments of counsel and finds that there is no genuine issue as to any material fact in this cause and that the Plaintiff and Plaintiff-Intervenor are entitled to a judgment

as a matter of law. The Court accordingly finds that the motions of San Antonio Metropolitan Transit Authority and American Public Transit Association for summary judgment should be granted and that the motions for partial summary judgment of the Secretary of Labor and Joe G. Garcia should be denied.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED:

1. That the motions for summary judgment of Plaintiff San Antonio Metropolitan Transit Authority and Plaintiff-Intervenor American Public Transit Association are hereby granted;

2. That local public mass transit systems (including San Antonio Metropolitan Transit Authority) constitute integral operations in areas of traditional governmental functions under the decision of the United States Supreme Court in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) and that the Secretary of Labor of the United States cannot apply or seek to enforce the minimum wage and overtime pay provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.*, against local public mass transit systems in the United States, including San Antonio Metropolitan Transit Authority;

3. That the "Final Interpretation" issued by the Wage and Hour Division of the United States Department of Labor on December 21, 1979 (44 Federal Register 75628-75630) is null and void insofar as it lists local public mass transit systems as not being integral operations in areas of traditional governmental functions under *National League of Cities* v. *Usery, supra*;

4. That the motions for partial summary judgment filed by the Secretary of Labor and Joe G. Garcia are hereby denied;

5. That the counterclaim filed by the Secretary of Labor on February 8, 1980 is hereby dismissed with prejudice; and

6. That the Defendant Secretary of Labor and Defendant-Intervenor Joe G. Garcia pay all costs incurred in this action by Plaintiff and Plaintiff-Intervenor.

SIGNED this 17 day of November, 1981.

/s/ Fred Shannon
FRED SHANNON
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

Civil Action No. SA-79-CA-457

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, PLAINTIFF

and

AMERICAN PUBLIC TRANSIT ASSOCIATION, PLAINTIFF-INTERVENOR

v.

THE HONORABLE RAYMOND J. DONOVAN, SECRETARY OF LABOR OF THE UNITED STATES, DEFENDANT

and

JOE G. GARCIA, DEFENDANT-INTERVENOR

Filed Dec. 17, 1981

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Pursuant to 28 U.S.C. §§ 1252 and 2101(a), the Secretary of Labor hereby appeals to the Supreme Court of the United States from the Judgment of this Court in the above-styled action entered on November 17, 1981.

DATED: December 17, 1981.

Respectfully submitted,

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APPENDIX C

1. The Constitution of the United States provides in pertinent part:

Article I, Section 8:

> The Congress shall have Power
>
> * * * * *
>
> To regulate Commerce * * * among the several States * * *;
>
> * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article VI, cl. 2:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * *.

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

2. The Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. III) 201 *et seq.*, provides in pertinent part:

29 U.S.C. (& Supp. III) 203:

> As used in this chapter—
>
> * * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

* * * * *

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose. * * * For purposes of this subsection, the activities performed by any person or persons—

* * * * *

(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(3) in connection with the activities of a public agency,

shall be deemed to be activities performed for a business purpose.

* * * * *

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees

engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and which—

* * * * *

(5) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(6) is an activity of a public agency.

* * * * *

The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.

29 U.S.C. (Supp. III) 206(a):

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the produc-

tion of goods for commerce, wages at the following rates:

(1) not less than $2.65 an hour during the year beginning January 1, 1978, not less than $2.90 an hour during the year beginning January 1, 1979, not less than $3.10 an hour during the year beginning January 1, 1980, and not less than $3.35 an hour after December 31, 1980, except as otherwise provided in this section;

29 U.S.C. 207(a):

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

3. The Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. III) 1601 *et seq.*, provides in pertinent part:

49 U.S.C. 1601:

(a) The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local juris-

dictions and often extend into two or more States;

(2) that the welfare and vitality of urban areas, the satisfactory movement of people and goods within such areas, and the effectiveness of housing, urban renewal, highway, and other federally aided programs are being jeopardized by the deterioration or inadequate provision of urban transportation facilities and services, the intensification of traffic congestion, and the lack of coordinated transportation and other development planning on a comprehensive and continuing basis; and

(3) that Federal financial assistance for the development of efficient and coordinated mass transportation systems is essential to the solution of these urban problems.

(b) The purposes of this chapter are—

(1) to assist in the development of improved mass transportation facilities, equipment, techniques, and methods, with the cooperation of mass transportation companies both public and private;

(2) to encourage the planning and establishment of areawide urban mass transportation systems needed for economical and desirable urban development, with the cooperation of mass transportation companies both public and private; and

(3) to provide assistance to State and local governments and their instrumentalities in financing such systems, to be operated by public or private mass transportation companies as determined by local needs.

49 U.S.C. (Supp. III) 1603(a):

* * * The Federal grant for any such project to be assisted under Section 1602 of this title shall be in an amount equal to 80 per centum of the net project cost. * * *

49 U.S.C. 1604(e):

The Federal grant for any construction project under this section shall not exceed 80 per centum of the cost of the construction project, as determined under section 1603(a) of this title. The Federal grant for any project for the payment of subsidies for operating expenses shall not exceed 50 per centum of the cost of such operating expense project. * * *

49 U.S.C. 1609(c):

It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collec-

tive bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

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Motion to Dismiss or Affirm

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Nos. 81-1728 and 81-1735

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RAYMOND J. DONOVAN, Secretary of Labor, *Appellant*,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY AND AMERICAN PUBLIC TRANSIT ASSOCIATION, *Appellees*.

JOE G. GARCIA, *Appellant*,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY AND AMERICAN PUBLIC TRANSIT ASSOCIATION, *Appellees*.

On Appeals From The United States District Court For The Western District Of Texas

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MOTION TO AFFIRM

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QUESTIONS PRESENTED

For many years before Congress attempted to extend the compensation requirements of the Fair Labor Standards Act to local transit, many major metropolitan areas provided publicly owned local transit services with the support of state and local tax revenues. Almost all major cities provide subsidized local public transit services today; about 90 percent of the nation's local transit revenues, total local transit miles and passenger trips are attributable to publicly owned local mass transit systems. Therefore, the questions presented are:

1. Does the holding of *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), that the minimum wage and overtime compensation provisions of the Fair Labor Standards Act may not be applied to "integral operations in areas of traditional governmental functions," *id.* at 852, preclude application of these statutory provisions to publicly owned local mass transit systems?

2. Did that decision strike down on constitutional grounds so much of the coverage of state and local government functions by the minimum wage and overtime compensation provisions of the Fair Labor Standards Act that it is unfair and unwarranted without new congressional enactment to apply them to publicly owned local mass transit systems?

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Nos. 81-1728 and 81-1735

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RAYMOND J. DONOVAN, Secretary of Labor, *Appellant*,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY AND AMERICAN PUBLIC TRANSIT ASSOCIATION, *Appellees*.

JOE G. GARCIA, *Appellant*,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY AND AMERICAN PUBLIC TRANSIT ASSOCIATION, *Appellees*.

On Appeals From The United States District Court For The Western District Of Texas

MOTION TO AFFIRM

The American Public Transit Association (APTA) moves, pursuant to Rule 16 of the Supreme Court, to affirm the judgment of the court below on the ground that it was clearly correct in deciding that this case is controlled by the rule of law established in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976).

STATEMENT OF THE CASE

1. This case arises out of a dispute between the various states and the federal government that has ensued since 1966, when Con-

gress, acting pursuant to its Commerce Clause powers, amended the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (1976) (FLSA), in an attempt, for the first time, to include some state activities within its coverage. When enacted in 1938, the FLSA prescribed minimum wage and overtime compensation requirements for private employers engaged in interstate commerce, but specifically excluded states and their political subdivisions from its coverage. Ch. 676, § 3, 52 Stat. 1060 (1938). In 1966, however, Congress amended the FLSA to cover — whether publicly or privately owned — schools, institutions, hospitals, and some employees of "street, suburban or interurban electric railways, or local trolley or motorbus carrier[s] . . . [whose] rates and services . . . are subject to regulation by a State or local agency."[1] Pub. L. No. 89-601, § 102, 80 Stat. 830, 831 (1966); however, the operators, drivers and conductors of covered transit services were granted a specific exemption from the overtime compensation provision of the statute. Pub. L. No. 89-601, § 206, 80 Stat. 830, 836 (1966).

The states immediately challenged the constitutionality of this initial federal attempt to dictate employees' compensation requirements for publicly owned schools and hospitals, but the amendments were sustained in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968). Thereafter, in 1974, Congress again attempted to broaden the FLSA's coverage to virtually all state and local public employees. The specific exemption for the operators of street electric railways and trolley and motorbus carriers was phased out over a two-year period. Pub. L. No. 93-259, § 21(b), 88 Stat. 55, 68 (1974). Thus, it was not until 1976, only six years ago, that Congress intended to subject the largest category of local public transit employees to the full federal overtime compensation requirements.

Again, Congress' efforts to dictate minimum wage and overtime requirements to state and local governments were immediately challenged, this time successfully. In *National League of Cities* v.

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[1] Street electric railways are a form of local transit, as are trolleys and buses. Historically they have not been part of the main-line railroad system, unlike commuter railroads. *See* American Public Transit Association, *Transit Fact Book* 72 (1981) (hereinafter cited as *Transit Fact Book*).

Usery, 426 U.S. 833 (1976), this Court determined that the Tenth Amendment and the system of federalism inherent in our Constitution prohibit application of the minimum wage and overtime compensation provisions of the FLSA to "*almost all* public employees employed by the States and by their various political subdivisions." 426 U.S. at 836 (emphasis supplied). To allow otherwise "would impair the States' 'ability to function effectively in a federal system.' " *Id.* at 852 (citation omitted). *Wirtz* was expressly overruled, and the Court reasoned that:

> If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' "separate and independent existence."

Id. at 851, *quoting Coyle* v. *Oklahoma*, 221 U.S. 559, 580 (1911). The Court concluded that "the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." *Id.* at 852.

National League of Cities held that the FLSA displaces an attribute of the states' sovereignty — the freedom to fix minimum wages and hours for their governmental employees — and therefore may not be applied to any

> activities [that] are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens.

Id. at 851 (footnote omitted).

As examples of protected activities, the Court listed "fire prevention, police protection, sanitation, public health, and parks and recreation." *Id.* In overruling *Wirtz*, the Court included schools and hospitals as well. *Id.* at 855. Though this list was "obviously not an exhaustive catalogue," *id.* at 851 n.16, no other state and local activities were expressly noted by the Court. In reaffirming the narrow holdings of *Parden* v. *Terminal Railway Co.*, 377 U.S. 184 (1964), *California* v. *Taylor*, 353 U.S. 553 (1957), and *United States*

v. *California*, 297 U.S. 175 (1936), the Court identified one exception to the "numerous line and support activities which are well within the area of traditional operations of state and local governments," 426 U.S. at 851 n.16, as "the operation of a railroad engaged in 'common carriage by rail in interstate commerce . . .,' " *id.* at 854 n.18, *quoting United States* v. *California*, 297 U.S. at 182; *see also United Transportation Union* v. *Long Island Rail Road*, 102 S. Ct. 1349, 1354 (1982).

2. The narrow question before the Supreme Court today is whether one of the few widespread activities of state and local governments that was not specifically addressed in *National League of Cities* — the provision of publicly owned local mass transit — is a protected function under *National League of Cities*. The district court in this case answered in the affirmative. This issue was not addressed in this Court's recent *United Transportation Union* decision. [2]

The federal appellant first indicated its intent to apply the FLSA to local publicly owned mass transit over two years after *National League of Cities* was decided, in a letter dated September 17, 1979 to a transit union. [3] The San Antonio Metropolitan Transit Authority (SAMTA) learned of the letter and sued on November 21, 1979 to declare such application unconstitutional. APTA was allowed to intervene on behalf of its members, which include most of the publicly owned local mass transit systems in the United States. On December 21, 1979, the federal appellant formally amended its FLSA regulations — without any public notice or comment — to assert that local publicly owned mass transit is not a traditional governmental function, and therefore is subject to the FLSA. 44 Fed.

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[2] In *United Transportation Union*, the federal appellant in this case expounded at length on the constitutionally significant differences between the regulatory schemes, histories and pervasiveness of state ownership of commuter railroads and local public mass transit. Brief for the United States as *Amicus Curiae* at 12, 25-27, nn.19-20.

[3] Letter dated September 17, 1979 to the Amalgamated Transit Union from the Deputy Administrator of the United States Department of Labor, Exhibit A, Brief of American Public Transit Association in Support of Motion for Summary Judgment.

Reg. 75,628 (1979); 29 C.F.R. § 775.2(b) (1981).[4] The federal appellant also counterclaimed on behalf of SAMTA's employees for back pay[5] and injunctive relief. An employee, Joe G. Garcia, was allowed to intervene.

The district court, having determined that there were no disputed facts, granted SAMTA's and APTA's motions for summary judgment, ruling "[t]hat local public mass transit systems (including San Antonio Metropolitan Transit Authority) constitute integral operations in areas of traditional governmental functions under the decision of the United States Supreme Court in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976)." Judgment of the United States District Court for the Western District of Texas, appended to Jurisdictional Statement of Appellant Donovan, at 2a.

ARGUMENT

National League of Cities governs this case. There, this Court decided that the establishment of minimum wages and overtime compensation for state and local employees is an essential attribute of state sovereignty. Therefore, the Court held that FLSA wage and overtime requirements may not be applied to state and local governments where they "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." 426 U.S. at 852.

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[4] Also listed in the regulation as functions to which the federal government believes the FLSA may be applied are off-track betting corporations, generation and distribution of electric power, provision of residential and commercial telephone and telegraphic communication, production and sale of organic fertilizer as a by-product of sewage processing, production, cultivation, growing or harvesting of agricultural commodities for sale to consumers, and repair and maintenance of boats and marine engines for the general public. 29 C.F.R. § 775.3(b) (1981). At the same time, the federal appellant indicated that the Department of Labor would not seek to apply the FLSA to libraries and museums. 29 C.F.R. § 775.4(b) (1981).

[5] The FLSA authorizes the Secretary of Labor to seek back pay and liquidated damages for all employees for two or three years if an employer did not compensate employees in the manner established by the FLSA. 29 U.S.C. §§ 216(c), 255(a) (1976).

Unlike the subsequent cases raising Tenth Amendment challenges to Congress' exercise of Commerce Clause power in which this Court has granted a petition for writ of certiorari or noted probable jurisdiction, *United Transportation Union, Hodel* v. *Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981), this case concerns precisely the same federal statutory provisions at issue in *National League of Cities*. Indeed, the only question now before this Court is the narrow issue of whether to apply *National League of Cities* to an activity of state and local government that was not specifically addressed in that opinion, but is clearly one of the "numerous line and support activities," 426 U.S. at 851 n.16, that constitute protected "traditional governmental functions," *id.* at 852.

Applying the facts about local transit to the guidelines of *National League of Cities*, as restated in *United Transportation Union* and *Hodel*, there can be no real doubt that local publicly owned mass transit shares the fundamental characteristics of those activities expressly cited by this Court as examples of traditional governmental functions. Local public transit is a service that numerous state and local governments have determined over many years is a governmental function, necessary to fulfulling their "role in the Union." *United Transportation Union*, 102 S. Ct. at 1356. Starting after the turn of the century, the nation's large urban and industrial centers began to provide public transit services in response to changing demands on the cities' transportation infrastructure and other burgeoning urban problems. Before Congress attempted to apply the overtime provisions of the FLSA to any transit system — public or private — the majority of residents of major urban areas were served by publicly owned transit systems,[6] and the majority of transit employees worked for publicly owned systems.[7] Today, about 90 percent of transit

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[6] See text accompanying notes 15, 16 and 17, *infra*.

[7] By late 1964, 56% of transit employees worked for public authorities. *Minimum Wage-Hour Amendments, 1965: Hearings on H.R. 8259 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 89th Cong., 1st Sess. 298 n.1 (1965) (testimony of C. Cochran) (hereinafter cited as *FLSA Hearings*).

revenues, total transit miles and linked passenger trips are attributable to publicly owned mass transit systems.[8]

Whether through regulation, subsidy or direct operation, local transit is a service that historically has always been the responsibility of state and local governments. It has never been the subject of pervasive federal Commerce Clause regulation; what Commerce Clause regulation has applied to local transit has applied as well to other "traditional governmental functions," 426 U.S. at 852, expressly protected under *National League of Cities*.

Moreover, local public transit is a function that is inextricably interconnected with other functions of state and local government (including budget and finances, traffic management, public safety, education, and urban planning and development).[9] It responds to local public health and welfare needs through, *inter alia*, the maintenance of a safe, efficient transportation infrastructure, the deterrence of congestion and traffic accidents and the provision of subsidized services to students, the elderly and disadvantaged populations.

Ownership of public transit by state and local government is as pervasive as is public ownership of educational institutions, hospitals and refuse collection services — all activities afforded protection by the express language in *National League of Cities*. The provision of federal financial assistance has been no more significant to this development than it has been to the establishment of the other state and local activities that are considered traditional governmental functions. Under our system of federalism, federal grant programs provide comparable or greater assistance to other state and local traditional governmental functions. State and local governments provide public transit, health, education, sanitation and other services because these are services that "States have traditionally afforded their citizens," *National League of Cities*, 426 U.S. at 851, in response to

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[8] Affidavit of Stanley G. Feinsod accompanying Brief of American Public Transit Association in Support of Motion for Summary Judgment ¶ 4 (hereinafter cited as Feinsod Affidavit); *Transit Fact Book* 43.

[9] Feinsod Affidavit ¶ 11; *see also Subway-Surface Supervisors Ass'n* v. *New York City Transit Auth.*, 44 N.Y.2d 101, 111, 375 N.E.2d 384, 389 (1978).

the needs of urban communities — not because federal aid has helped make this possible. Therefore, as a matter of fact, historical interpretation and constitutional law, appellants are wrong in asserting that the provision of federal grants affects whether the FLSA may be applied to local publicly owned mass transit.

Federal prescription of the means by which state and local governments pay overtime to their public employees — including bus drivers, hospital workers, park attendants and refuse collectors — constitutes impermissible interference with an attribute of state sovereignty, thereby "endanger[ing] [the States'] 'separate and independent existence.' " *United Transportation Union*, 102 S. Ct. at 1355, *quoting National League of Cities*, 426 U.S. at 851. Therefore, this Court should grant APTA's motion to affirm.

I. The Narrow Issue Before This Court Is Whether Publicly Owned Local Mass Transit Is A Traditional Governmental Function

This Court has twice reaffirmed the soundness of *National League of Cities*. *See United Transportation Union; Hodel*. *Hodel* reiterated the *National League of Cities* test succinctly:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." (426 U.S.) at 854. Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." *Id.*, at 845. And, third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions." *Id.*, at 852.

Hodel, 452 U.S. at 287-88 (emphasis in original). "However, even if these three requirements are met, the federal statute is not automatically unconstitutional under the Tenth Amendment. The federal interest may still be so great as to 'justif[y] State submission.' *Ibid.*, ____ U.S. at ____, n.29, 101 S. Ct. at 2366, n.29. *Cf.*, *Case* v. *Bowles*, 327 U.S. 92 . . . (1946)." *United Transportation Union*, 102 S. Ct. 1353 n.9.

All but possibly one of these requirements for invalidating application of the FLSA to local publicly owned mass transit were expressly

decided in *National League of Cities*. First, this Court determined that application of the FLSA to states and their political subdivisions is a regulation of the "States as States," 426 U.S. at 845. Second, this Court decided that the FLSA's regulation of minimum wage and overtime compensation for state and local employees addresses a matter that is an "undoubted attribute of state sovereignty." *Id.* Furthermore, unlike the Railway Labor Act, 29 U.S.C. §§151 *et seq.* (1976), at issue in *United Transportation Union*, the Court in *National League of Cities* determined that the federal interest in the FLSA was not "so great as to 'justif[y] State submission.' " *United Transportation Union*, 102 S. Ct. at 1353 n.9, *quoting Hodel*, 452 U.S. at 288 n.29.

The final inquiry called for by *Hodel* is into whether publicly owned local mass transit services are the kind of governmental activity about which it is "apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.' *Id.* at 852, 96 S. Ct. at 2472." *Hodel*, 452 U.S. at 288 (footnote omitted). [10]

In *National League of Cities*, however, this Court made quite clear that the imposition of federal wage and overtime provisions on state and local government employees does "impermissibly interfere" with "integral governmental functions," leaving little of the "States' 'separate and independent existence,' " 426 U.S. at 851 (citation omitted), and impairing their " 'ability to function effectively in a federal system,' " *id.* at 852 (citation omitted). Thus, *National League of Cities* has decided part of this test, leaving unresolved only whether local publicly owned transit is a traditional function.

II. The Lower Court Decision Is Consistent With *National League Of Cities*

As the district court concluded, the provision by state and local governments of local publicly owned mass transit services is as

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[10] *Hodel* involved federal steep slope performance standards for private surface coal mining operators. Carefully distinguishing *National League of Cities*, the Court in *Hodel* noted that:

> [T]he States are not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever.

452 U.S. at 288.

integral to the public responsibilities of this level of government as are "fire prevention, police protection, sanitation, public health, and parks and recreation," *National League of Cities*, 426 U.S. at 851, and schools and hospitals, *id.* at 855, which this Court has held are "typical" examples, *id.* at 851, of those "activities which are well within the area of traditional operations of state and local governments," *id.* at 851 n.16. [11]

A. Publicly Owned Local Mass Transit Is A Traditional Governmental Function

Analysis of the facts in this case clearly establishes that local publicly owned mass transit is an activity that "States have regarded as integral parts of their governmental activities." *National League of Cities*, 426 U.S. at 854 n.18. In the earliest days of our republic, the transportation infrastructure of local governments consisted of roads, but that long ago became inadequate. "In 1905 congested traffic at rush hours was described as the number one problem of large cities in the United States." W. Owen, *The Metropolitan Transportation Problem* 6 (rev. ed. 1966). "In the past, however, advancing technology seemed to save the day at the critical moment . . . . The developments in public transit managed . . . to make relatively intensive use of limited urban space and provide mobility within the city at a comparatively low cost to the bulk of the population." G. Smerk, *Urban Mass Transportation* 9 (1974). Several major cities entered into the provision of publicly owned transit services financed through state and local bond issues or taxes early in this century. [12] San Francisco did so in 1912, Seattle in 1919, Detroit in 1922 and New York City in 1932. [13]

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[11] While distinctions can be drawn between local transit and the activities enumerated in *National League of Cities*, and

> [w]hile there are obvious differences between the schools and hospitals involved in *Wirtz*, and the fire and police departments affected here, each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens.

426 U.S. at 855 (footnote omitted).

[12] *See, e.g.*, C.Thompson, *Public Ownership* 225-226, 240-241 (1925).

[13] American Public Works Association, *History of Public Works in the United States, 1776-1976* 177 (1976).

As early as 1932, 43.9 percent of the residents of cities with populations of 500,000 or more were served by publicly owned mass transit and 33 percent of residents of cities with a population of or exceeding 250,000 were served by publicly owned transit. [14] Many other major urban centers in the country had entered into the provision of public transit services by 1960. [15] By that year, 66.2 percent of those residents of urban areas with a population of 500,000 or more were provided with local public mass transit services; 48.1 percent of residents of urban areas with populations of or exceeding 250,000 had such services. [16] These figures had increased to 73.3 percent and 57.1 percent for cities with populations exceeding 500,000 and 250,000, respectively, [17] by fiscal 1964, the year before federal funds became available under the Urban Mass Transportation Act of 1964, 49 U.S.C. §§ 1601 *et seq.* (1976) (UMTA), and two years before the overtime provisions of the FLSA were extended to any form of local transit.

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[14] Population statistics are from U.S. Department of Commerce, *Statistical Abstract of the United States*, Table 9 at 10-12 and Table 10 at 13 (66th ed. 1945-46), and from U.S. Department of Commerce, *Statistical Abstract of the United States*, Table 10 at 15 and Table 14 at 19-20 (86th ed. 1965) (published annually; hereinafter cited as *SAUS* (19__)). Cities served by public transit are from sources cited in note 13, *supra*, and note 15, *supra*. Percentages for a given year are derived by adding the populations of the cities served by publicly owned transit systems, then dividing that sum by the total United States urbanized population of cities of the indicated size.

[15] Cleveland acquired its public transit system in 1942, and public transit systems serving Boston and Chicago were acquired in 1947, American Public Works Association, *History of Public Works in the United States, 1776-1976* 177 (1976). Los Angeles, San Antonio, and Sacramento were served by publicly owned systems by 1959, J. Moody, *Moody's Transportation Manual* a70 (1960), Oakland by 1960, Memphis by 1961, J. Moody, *Moody's Transportation Manual* a72 (1961), and Miami in 1962, J. Moody, *Moody's Transportation Manual* a78 (1962). Public transit systems serving Long Beach and St. Louis were acquired in 1963, followed by those serving Dallas and Pittsburgh in early 1964, J. Moody, *Moody's Transportation Manual* a60-a61 (1964).

[16] See note 14, *supra*.

[17] See note 14, *supra*.

The trend toward government provision of transit services was well established before the enactment of UMTA. There is no doubt that federal aid helped many cities, particularly smaller cities, assume or enhance their direct responsibility for providing transit services as private systems were unable to operate profitably and were unable to satisfy the public welfare obligations that urban transit had assumed. [18] But it is simply historical revisionism to imply that state and local governments provide transit services because federal aid enticed them into doing so. [19] Federal grant aid to cities in support of transit services — like federal aid to education, hospitals and law enforcement — simply demonstrates that Congress thought it important that states be able to meet their local public welfare responsibilities in these areas. *See* 49 U.S.C. §§1601(b)(3), 1601a.

Today, almost all of the metropolitan areas in the country with a population over 200,000 are served by transit systems owned by state or local government agencies. [20] Moreover, as time has gone on, local governments in rural areas have also responded to this need. By 1981, 248 out of 339 transit operations in non-urbanized areas (73 percent) were publicly owned. [21] By 1978, about 90 percent of transit revenues, total transit miles, total transit vehicles owned and leased, and

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[18] "Today nine tenths of the mounting expenses of city governments are for services that did not exist at the turn of the century — traffic engineering, airports, parking facilities, health clinics, and a long list of others." W. Owen, *The Metropolitan Transportation Problem* 4-5 (rev. ed. 1966).

[19] The argument by appellants that transit is public because of federal funding is also contradicted by their own briefs. They recognize that Congress did not intend UMTA to prompt the shift from private to public transit. Jurisdictional Statement of Appellant Donovan at 15; Jurisdictional Statement of Appellant Garcia at 11. This is precisely the point. The passage of UMTA was clearly not intended to encourage the growth of publicly owned local mass transit. *See, e.g.*, 49 U.S.C. § 1602(e) (1976); S. Rep. No. 82, 88th Cong., 1st Sess. 19 (1963).

[20] U.S. Department of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas Over 50,000 Population* 1-12 (Aug. 1981).

[21] U.S. Department of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Rural Public Transportation Service* 13 (Feb. 1981).

linked passenger trips were attributable to publicly owned mass transit systems. Feinsod Affidavit ¶ 4; *Transit Fact Book* 43.

Appellants contend that because transit has become a pervasively state and local governmental function in recent decades, this activity is somehow disqualified from protection under *National League of Cities*.[22] But this "static historical view" was expressly rejected by this Court in *United Transportation Union*, 102 S. Ct. at 1354, when it clarified that it would "not merely . . . look[] only to the past to determine what is 'traditional.' " *Id.* It stated:

> *This Court's emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation.* Rather it was meant to require an inquiry into whether the federal regulation affects basic State prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its "separate and independent existence." *Ibid.* 426 U.S. at 851.
>
> . . . .

Id. at 1354-55 (emphasis supplied).

Many state and local governments assumed the responsibility for providing mass transit services and funding them from tax revenues after it became clear that private companies could not operate them profitably.[23] APTA is unaware of any publicly owned local mass transit system that does not operate on a deficit basis. Feinsod Affidavit ¶ 6. Fare box revenues constitute only about half of the operating costs with state and local aid providing about 33 percent and federal aid providing about 15 percent of operating costs. *Id.* at ¶¶ 6, 7. It is beyond doubt that states do not provide transit services to "engag[e] in business activities which have as their aim the production of revenues in excess of costs." *See Lafayette* v. *Louisiana Power & Light*, 435 U.S. 389, 418 n.1 (1978) (opinion of Burger, C. J.). This fact alone distinguishes local public transit from most, if not all, the activities listed in the Department of Labor's regulation as non-

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[22] Jurisdictional Statement of Appellant Donovan at 17-19; Jurisdictional Statement of Appellant Garcia at 23-24.

[23] *Transit Fact Book* 27; D. Barnum, *From Private to Public: Labor Relations in Urban Transit*, 25 Ind. & Labor Rel. Rev. 95, 99 (1971).

traditional governmental functions. *See* 29 C.F.R. § 775.3 (1981). *See also South Carolina* v. *United States*, 199 U.S. 437, 458 (1905) (tax on state sale of liquor was a "charge on a business before any profits"). Nor did state and local governments assume the responsibility for providing transit services to perpetuate a failing enterprise; rather the states have undertaken this obligation because they regard the maintenance of urban transportation infrastructures accessible to all residents "as integral parts of their governmental activities," *National League of Cities*, 426 U.S. at 854 n.18, and as "governmental services which their citizens require," *id.* at 847. Moreover, these services are for the benefit of the local community, rather than as part of a network that serves all parts of the country.

Public transit agencies are organizationally integrated or closely coordinated with other essential local governmental services such as street and traffic management, public works, land use planning and zoning — often under the umbrella of a common city department or regional authority. Feinsod Affidavit ¶ 11. Transit agencies form an important part of a local government budget. *See, e.g., Subway-Surface Supervisors Association* v. *New York City Transit Authority*, 44 N.Y.2d 101, 111, 375 N.E.2d 384, 389 (1978) (transit system is performing a governmental function because of the "intertwinement" between its finances and the city's). In order to keep the user charges low enough to serve those in a local community dependent on inexpensive transportation,[24] local public mass transit is heavily subsidized with general and special local tax revenues. Feinsod Affidavit ¶ 8. Reduced fares are provided for students and the elderly, *id.* at ¶ 9B, and fares are kept low in the face of rising costs, making transportation accessible to the poor and to low and middle income workers, *id.* at ¶ 9A.

In sum, publicly owned local mass transit falls squarely within the category of activities protected in *National League of Cities*. All

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[24] The fact that transit systems charge fares does not convert them into businesses and therefore activities which ought not to be protected under *National League of Cities*. User charges also contribute, *inter alia*, to the operation of public hospitals, parks and recreation, and sanitation. Institute of Public Administration, *Financing Transit: Alternatives for Local Government* 228 (July 1979).

lower courts save two have so held. [25] That decision was grounded on our constitutional system of shared powers of federal and state government which requires that neither federal nor state government shall encroach on the independent authority of the other. *See, e.g., Younger* v. *Harris*, 401 U.S. 37, 44 (1971); *Metcalf & Eddy* v. *Mitchell*, 269 U.S. 514, 523-24 (1926); *Ex Parte Siebold*, 100 U.S. 371, 394 (1880); *Lane County* v. *Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869). [26] There are certain core activities that are integral functions of government, regardless of the interest by the private sector in providing them as well. For state and local governments, these activities have generally been defined by the need to make fundamental services available to all regardless of ability to pay. These have included the provision of an education, the maintenance of public health, the infrastructure for traveling within the local community, and safety measures from dangers such as theft or fire — the basic prerequisites to "the internal order" of the state and its political subdivisions. *See The Federalist No. 45*, at 313 (J. Madison) (J. Cooke ed. 1961). The particular activities undertaken by state governments and their political subdivisions to provide these fun-

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[25] *Accord Dove* v. *Chattanooga Area Regional Transportation Authority*, Civ. A. No. 1-80-249 (E.D. Tenn. July 21, 1981), *appeal docketed*, No. 81-5636 (6th Cir. Sept. 2, 1981); *Alewine* v. *City Council of Augusta, Georgia*, 505 F. Supp. 880 (S.D. Ga. 1981), *appeal docketed*, No. 81-7490 (11th Cir. June 5, 1981); *Francis* v. *Tallahassee*, Case No. 79-446 (2d Cir. Fla. Dec. 8, 1980); *contra Kramer* v. *New Castle Area Transit Authority*, No. 81-2223 (3d Cir. April 30, 1982), *reversing* Civ. A. No. 80-1008G (W.D. Pa. June 11, 1981); *Joiner* v. *Macon*, Civ. A. No. 79-287-MAC (M.D. Ga. April 24, 1981), *appeal docketed*, No. 81-7789 (11th Cir. June 14, 1981).

[26] *Cf. Fry* v. *United States*, 421 U.S. 542, 555 n.1 (1975) (Rehnquist, J., dissenting): "The Court in *Helvering* v. *Gerhardt*, 304 U.S. 405, 424 (1938), was careful to distinguish between the imposition of a federal income tax on the New York Port Authority, a question which it reserved, and such a tax upon an employee of the Authority, a question which it decided in favor of taxability." School, hospital and police employees all pay federal income taxes, yet their state and local governmental employers are not subject to the FLSA. *See also Massachusetts* v. *United States*, 435 U.S. 444, 458-59 (1978) (opinion of Brennan, J.).

damental requisites of community life have differed over time, but have always been an integral part of state and local government.

B. Public Ownership Of Local Transit Is Comparable To That Of Other Significant Local Government Activities Not Subject To The Fair Labor Standards Act (FLSA) Wage And Hour Requirements

The provision of local public mass transit services is as much a state and local government function as are many of the protected functions specifically addressed in *National League of Cities*. The figures in appellants' Jurisdictional Statements showing that only roughly half of the transit systems in cities over 50,000 population are public are misleading. The 686 systems in question include the smallest, with only one bus, and the largest, with over 2,000 buses. [27] The principal provider of transit services in each of the 25 largest urbanized areas in the United States and in at least 100 of the 106 urbanized areas having populations exceeding 200,000 is publicly owned. [28]

Even if all transit systems are treated equally regardless of size, as appellants suggest, local transit is provided by state and local governments as pervasively as are several activities expressly protected in *National League of Cities*. In 1979, 51 percent of transit systems were owned by state or local governments, *Transit Fact Book* 43; thus, 49 percent of systems were privately owned. As of that year, private schools accounted for 20 percent of elementary schools, 19.3 percent of secondary schools, and 56.5 percent of post-secondary schools. [29] In 1979, 58.3 percent of hospitals and 56.3 percent of beds were under private ownership; 26.4 percent of hospitals and 15.6 percent

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[27] U.S. Department of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas Over 50,000 Population* 4 (Aug. 1981).

[28] *Id.* at 1-12.

[29] *SAUS*, Table 214 at 132 (1981). Private elementary schools were 16,100 out of a total of 80,500; private secondary schools were 5,800 out of a total of 30,000; and private post-secondary schools were 1,623 out of a total of 2,871. 1980 data are available, but 1979 figures are used for comparability.

of beds were under state and local government ownership; and 5.2 percent of hospitals and 8.5 percent of beds were federally owned. [30] Moreover, in 1974, private firms collected 50 percent of all residential waste and 90 percent of all commercial waste. H.R. Rep. No. 1461, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 6323, 6325. [31] Thus, the fact that private companies also provide some local transit services cannot be a determinative factor under *National League of Cities*. [32]

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[30] *SAUS*, Table 175 at 110 (1981). There were 361 federal hospitals with 117,000 beds, 1,846 state and local government hospitals with 214,000 beds, and 4,077 private hospitals (nonprofit and for profit) with 773,000 beds in that year. The ownership of 10.1 percent of hospitals and 19.4 percent of beds cannot be determined from Table 175.

[31] In fact, private refuse haulers have served the White House since the days of President John Adams. American Public Works Association, *History of Public Works in the United States, 1776-1976* 433 (1976).

[32] The federal appellant further argues that mass transit is different from those activities specifically protected in *National League of Cities* because some publicly owned transit systems "have contracted out responsibility for operation of these systems to private transit management companies." Jurisdictional Statement of Appellant Donovan at 13. The argument overstates the role of transit management companies, which provide a contractual service similar to the contractual services provided in other areas expressly protected; *e.g.*, in 1973 at least 16% of 661 cities of various sizes contracted with private firms for refuse collection, an activity presumably included by this Court under the protected category of sanitation. American Public Works Association, *Solid Waste Collection Practice* 236 (4th ed. 1975). Also, increasing numbers of city and county hospitals are being managed by private firms. By 1980, nearly 150 government hospitals were privately managed. *Investor-owned Company Management of Government Hospitals Continues to Rise*, 13 Federation of American Hospitals Review 25 (Feb./Mar. 1980); *see also* D. Fisk, H. Kiesling, T. Muller, *Private Provision of Public Services: An Overview* 67 (Urban Institute 1978). To a lesser degree, local governments have contracted privately for police services and fire protection services. *Id.* at 32-39.

C. There Is No Federal Interest Independent Of The FLSA Supporting Its Application To Publicly Owned Local Mass Transit

Contrary to the appellants' assertions, the federal interest in local public transit has merely affirmed the fundamental local character of, and responsibility for, local public mass transit. Indeed, federal grant aid and federal attempts to impose wage and hour regulations on transit employees are a relatively recent phenomenon. In fact, the federal government has itself recently emphasized the predominant state and local responsibility for providing public transit services, in proposing to limit further federal financial assistance:

> Primary responsibility for mass transit should remain with State and local governments. Decisions about service levels, equipment and facilities, fares, wage rates and management practices are better left to local decision-makers. Excessive levels of Federal assistance unfortunately lead to excessive Federal interference in these local decisions . . . .

Office of Management and Budget, *Major Themes and Additional Budget Details: Fiscal Year 1983* at 121.[33]

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[33] The President's announcement of his "Federalism Initiative" to implement his State of the Union address echoed this theme:

> Turnback [to states] consists of federal categorical and block grant programs *oriented toward local community need and individual service delivery — activities best suited for state/local management discretion*. Proposed major programs would include:
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> Non-interstate highways, airports and *local mass transit;*
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> Sewer treatment grants, UDAG, CDBG, and rural water/sewer and facilities grants;
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> Vocational rehabilitation and education, training and employment grants and state education block grant;
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> Health, social services and community services block grant, child nutrition, low income energy assistance, and numerous categorical social welfare programs;
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> Revenue sharing.

Office of the Press Secretary, The White House, *The President's Federalism Initiative: Basic Framework* 7 (January 26, 1982) (emphasis supplied). *See also* 46 Fed. Reg. 44,980 (1981) ("EPA agrees that the State should have ultimate responsibility for identifying its transit needs and deciding how to meet them. . . . Also, this approach appears in the proposed EPA/USDOT [Department of Transportation] national policy on basic transportation needs.")

These recent statements of federal policy simply confirm an historical fact. Transit has always been a local responsibility. There simply is not, and never has been, any comprehensive federal system of law regulating local transit. *See Local Div. 589, Amalgamated Transit Union* v. *Massachusetts*, 666 F.2d 618, 633, *reh'g en banc denied*, 666 F.2d 645 (1st Cir. 1981) (hereinafter cited as *Local Div. 589*). State or local laws have, for example, dictated the rates charged users of local public mass transit,[34] equipment standards for transit vehicles,[35] the licensing of drivers of those vehicles,[36] and traffic safety rules.[37]

The only federal laws appellants cite as applicable to private local transit, Jurisdictional Statement of Appellant Donovan at 18-19, Jurisdictional Statement of Appellant Garcia at 14, apply equally to the private counterparts of the activities expressly protected in *National League of Cities*. For example, the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (1976), regulates private counterparts of all the protected activities and transit, but it specifically exempts state and local government employees. *Id.* § 152 (2). Furthermore, the statutes appellants cite do not establish a comprehensive scheme of federal regulation unique to transit labor relations, as, for example,

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[34] *See, e.g.*, Cal. Pub. Util. Code §§ 211, 216, 451 (West Supp. 1982); N.Y. Pub. Serv. Law § 60-a (McKinney 1955 & Supp. 1981) (superseded by N.Y. Transp. Law § 141 (McKinney 1975)); Wash. Rev. Code Ann. §§ 81.64.010, 81.64.080 (1962).

[35] *See, e.g.*, as to buses, Cal. Veh. Code §§ 24951, 25400, 26454(b)(1), 26700, 26706-26709, 26711, 35106, 35250, 35400, 35550-35551.5 (West 1971 & Supp. 1982); Ill. Ann. Stat. Ch. 95 1/2 §§ 1-107, 15-102 (Smith-Hurd Supp. 1981); N.Y. Veh. & Traf. Law §§ 104, 375, 385 (McKinney Supp. 1981); Wash. Rev. Code Ann. §§ 46.04.320, 46.37.005-46.37.500 (1970 & Supp. 1981); and, as to street railways, Cal. Pub. Util. Code § 7810 (West 1965).

[36] *See, e.g.*, Cal. Veh. Code § 12804 (West 1971); Ill. Ann. Stat. Ch. 95 1/2 §§1-146, 6-104 (Smith-Hurd 1971); N.Y. Veh. & Traf. Law §§ 509a-509h (McKinney Supp. 1981); Wash. Rev. Code Ann. §§ 46.04.416, 46.20.440, 46.20.450 (1970 & Supp. 1981).

[37] *See, e.g.*, Cal. Veh. Code §§ 21000 *et seq.* (West 1971 & Supp. 1982); Ill. Ann. Stat. Ch. 95 1/2 §§ 11-100 *et seq.* (Smith-Hurd 1971 & Supp. 1981); N.Y. Veh. & Traf. Law §§ 1100 *et seq.* (McKinney 1970 & Supp. 1981); Wash. Rev. Code Ann. §§ 46.61.005 *et seq.* (1970 & Supp. 1981).

the Railway Labor Act does for railroads. Instead, the cited statutes regulate certain particular employment conditions for virtually all private employers in interstate commerce. In contrast, there are state collective bargaining laws in most states that govern labor relations for public employees, including public transit employees. U.S. Department of Labor, *Summary of Public Sector Labor Relations Policies* v (1981). Finally, the statutes appellants cite, except the National Labor Relations Act, were enacted after the state and local governments of many of the major metropolitan areas were providing local public transit services.

Appellants' reliance on UMTA to bolster their weak arguments that the FLSA may be applied to publicly owned local transit is completely misplaced. They argue that the assumption of transit services by state and local governments was "assisted and accelerated," Jurisdictional Statement of Appellant Donovan at 9, by federal aid and that this apparently denies local public transit status as a "traditional governmental function[]," *National League of Cities*, 426 U.S. at 852. But, as noted above, prior to the availability of UMTA funds the majority of the largest urban centers had publicly owned systems. Of the twenty-one cities with populations in excess of 500,000,[38] twelve were served by publicly owned transit systems.[39] Prior to UMTA, states and their political subdivisions, therefore, had demonstrated a significant and widespread determination that provision of local mass transit services is an integral governmental function, indeed an integral component of the transportation infrastructure that always has been a traditional function of state and local government.

Appellants confuse Congress' Spending Powers, which were expressly not addressed in *National League of Cities*, 426 U.S. at 852 n.17, with its Commerce Clause powers which are limited by the Tenth Amendment. UMTA is a regular federal funding statute, like federal grant programs that assist schools, hospitals, police and fire departments and sanitation. *Cf. Pennhurst State School and Hospital*

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[38] *SAUS*, Table 14 at 19-20 (1965).

[39] See note 14, *supra*.

v. *Halderman*, 451 U.S. 1 (1981). Moreover, unlike the Railway Labor Act at issue in *United Transportation Union*, UMTA does not express an intent to be part of a comprehensive system of federal regulation of local transit. *Local Div. 589*, 666 F.2d at 633-34, nor does any such system exist.

The federal appellant states that "[b]y 1978 more than $13 billion in federal aid to transit had been awarded under UMTA and other federal programs."[40] Jurisdictional Statement of Appellant Donovan at 15 (citation omitted). In the same years, more than $57.8 billion in federal aid was given to public elementary and secondary schools.[41] Similarly, in 1971 through 1981 the federal government had awarded states $27.11 billion in sewage treatment construction grants.[42]

In 1979, for example, the federal government subsidized local sanitation and sewage with $3.7 billion,[43] which accounted for 31.4

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[40] Appellants state that Congress has authorized federal financing of 80% of net capital investments and 50% of operating expenses. Jurisdictional Statement of Appellant Donovan at 15; Jurisdictional Statement of Appellant Garcia at 13. Although this statement is correct, it is misleading. The fact is that these figures are maximums and the actual federal investment has been substantially less. In 1975, 1976 and 1977, for example, the federal government provided 21.4%, 25.6% and 30.7%, respectively, of the operating assistance given to transit systems in the United States. The remainder of operating assistance came from state and local governments. *Transit Fact Book* 46.

[41] The $57.8 billion figure is the sum of the figures for the school years ending in 1965 through 1978 (excluding 1967, for which data are not available). For 1966, 1970, and 1975-1978, see *SAUS*, Table 218 at 135 (1981); for 1965, 1968 and 1969, see *SAUS*, Table 149 at 105 (1970); for 1971 and 1972, see *SAUS*, Table 157 at 106 (1972); for 1973, see *SAUS*, Table 186 at 117 (1976); and for 1974, see *SAUS*, Table 222 at 141 (1980).

[42] U.S. Department of the Treasury, *Federal Aid to States* (published annually; hereinafter cited as FAS 19__). The $27.12 billion figure is the sum of the annual figures. *See FAS* at 4 (1971); *FAS* at 4 (1972); *FAS* at 6 (1973); *FAS* at 5 (1974); *FAS* at 6 (1975); *FAS* at 8, 27 (1976); *FAS* at 6 (1977); *FAS* at 6 (1978); *FAS* at 7 (1979); *FAS* at 10 (1980); and *FAS* at 9 (1981).

[43] *FAS* at 7 (1979).

percent of total local expenditures of $11.77 billion on such services.[44] The federal subsidy took the form of capital grants for sewage treatment facilities.[45] This compares with only $2.96 billion provided by the federal government that year to local public mass transit, or 36.1 percent of available funds of $8.19 billion.[46] In 1977 to 1978, the federal government provided $7.7 billion in aid to public elementary and secondary schools, or 9.5 percent of all such revenue receipts.[47]

Indeed there are numerous state and local activities within the broad protected areas cited by this Court — for example, functions in the areas of sanitation, education and health — that arguably would not even exist but for federal funding.[48] Local public mass transit is

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[44] U.S. Department of Commerce, *Environmental Quality Control, Governmental Finance: Fiscal Year 1978-1979*, Table C at 4 (1981). The $11.77 billion figure does not include local expenditures on air quality control of $35 million, *see id.* at 8.

[45] *Id.* at 2.

[46] The $8.19 billion is the sum of $5.56 billion in revenues and operating subsidies (including $0.86 billion in federal operating assistance), *Transit Fact Book*, Table 5 at 46, $2.10 billion in federal capital grant approvals, *id.*, Table 19 at 67, and an estimated $0.53 billion in state and local matching expenditures.

[47] W. Grant & L. Eiden, *Digest of Education Statistics*, Table 64 at 71 (1980).

[48] For example, federal funding of advanced waste treatment facilities began in 1956. The Senate Report on the Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246 (repealed 1970) refers to "the long period of disregard and neglect that preceded Federal legislation in this field." S. Rep. No. 1367, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Ad. News 3969, 3975. Similarly, comprehensive, statewide health planning was "spotty and fragmented" prior to federal funding of such planning, *see* H.R. Rep. No. 2271, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Ad. News 3830, 3833 (Comprehensive Health Planning and Public Health Services Amendments of 1966, Pub. L. No. 89-789, 80 Stat. 1180 (1966)). The National Health Planning and Resources Development Act of 1974, 42 U.S.C. §§ 300k *et seq.* (1976), solidified federal dominance in the local and statewide health planning field. *See, e.g.*, 42 U.S.C. §§ 300*l*-1, 300*l*-2 (1976 & Supp. III 1979) (specifies structure and functions of local health systems agencies, which may themselves be local governmental units). For education, in the Education for All Handicapped

not one of these, but even if a particular form of transit were, certainly this Court would not adopt a rule that divides the protected functions into a multitude of pieces depending on the extent to which a party in litigation can prove that federal funding influenced the provision of the public services in which the particular state employees are engaged.

In light of the significant federal funding of activities this Court expressly found entitled to Tenth Amendment protection from the application of the FLSA in *National League of Cities*, the fact that the states received significant UMTA funds cannot be relevant in determining whether this activity is a traditional governmental function.[49]

Furthermore, in *National League of Cities* and in *United Transportation Union*, this Court determined the federal interest by looking exclusively to the subject of the federal regulation to be applied to the state or local governmental activity — the FLSA and the Railway Labor Act, respectively — not to the extent to which a federal funding statute provides assistance to the activity.[50] This is the only appropri-

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Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773, 775. Congress explicitly stated that "State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children." The federal role is to be "a catalyst to local and State program growth." S. Rep. No. 94-168, 94th Cong., 1st Sess., *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1429.

[49] Since early in this century, and especially since the Depression, the federal government has taken a greater share of the financial burden of the provision of virtually all state and locally provided services. J. Maxwell & J. Aronson, *Financing State and Local Governments* 10-30 (Brookings Institution 3d ed. 1977). By 1973, the federal government was the source of 41.6% of all civil expenditure, up from 19.1% in 1902. *Id.* at 15. But the final expenditure of the funds, and hence the provision of the services themselves, remained consistently local with the federal share rising modestly from 18.5% in 1902 to 24.2% in 1973. *Id.*

[50] The Secretary of Labor informed this Court of the amount of federal financial assistance to state and local governments in *National League of Cities*, Brief for the Appellee at 15 n.12, 25-27, 38, 45 n.36, yet this was not a factor in the Court's resolution of the case. *But see National League of Cities*, 426 U.S. at 878 (Brennan, J., dissenting).

ate approach because Congress has not attempted to regulate wages and hours through exercise of its Spending Power. *Cf. United States* v. *Butler*, 297 U.S. 1, 64 (1936); *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 292 (1936). Just as the "language and structure" of the statute at issue in *Pennhurst* "demonstrate that it is a mere federal-state funding statute," 451 U.S. at 18, UMTA is also simply a federal means of making funds available. Appellants do not contest the conclusion that UMTA is "a typical funding statute," *id.* at 22 (footnote omitted). Just as the statute in *Pennhurst* does not condition receipt of federal funds on state compliance with congressionally recognized rights of the disabled, *id.* at 22-23, UMTA does not condition receipt of federal funds on state compliance with minimum wage and overtime compensation requirements. The most closely related labor condition in UMTA is contained in Section 13(c), 49 U.S.C. § 1609(c) (1976), which requires "protective arrangements" against "worsening" of employment conditions, but does not require any particular compensation scheme not already in place. *Cf. Local Div. 589*, 666 F.2d at 634.

D. Application Of The FLSA To Publicly Owned Local Mass Transit Would Impermissibly Impair State And Local Operations

This Court determined in *National League of Cities* that application of the FLSA to traditional governmental functions would "directly impair [the states'] ability 'to structure integral operations.' " *Hodel*, 452 U.S. at 288, *quoting National League of Cities*, 426 U.S. at 852. As this Court said in *National League of Cities*, "we do not believe particularized assessments of actual impact are crucial to resolution of the issue presented . . . ." 426 U.S. at 851. Nonetheless, it is apparent that application of the FLSA requirements to local publicly owned transit systems would directly impair state and local governmental decisions about how to "structure delivery of those governmental services." *Id.* at 847.

The FLSA overtime requirements, in particular, directly impact on the ability of the state and local governments to structure routes,

employee work hours, service schedules and wage rates.[51] For example, the FLSA requires payment of time-and-one-half for hours worked over forty hours per week, which is computed in accordance with a federal statutory formula. 29 U.S.C. § 207(a) (1976); 29 C.F.R. Part 778 (1981). Many public transit systems find it necessary to schedule their employees in two split shifts at peak commuter hours,[52] and to provide premium compensation for the split working day.[53] If the FLSA applies, application of the federal statutory formula would superimpose additional compensation requirements, payroll costs and record-keeping obligations on top of existing employment arrangements — many of which have evolved over the years through local collective bargaining negotiations. This is not only unfair to the public employer, but, in the words of this Court in *National League of Cities*, 426 U.S. at 847: "[T]he Act displaces State policies regarding the manner in which they will structure delivery of those governmental services which their citizens require." As this Court articulated the impact:

> The requirement imposing premium rates upon any employment in excess of what Congress has decided is appropriate for a governmental employee's workweek, for example, appears likely to have the effect of coercing the States to structure work periods in some employment areas, such as police and fire protection, in a manner substantially different from practices

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[51] Appellants' statements that SAMTA or other transit systems pay the minimum wage or some form of overtime compensation, Jurisdictional Statement of Appellant Donovan at 7 n.12, Jurisdictional Statement of Appellant Garcia at 14-15, are irrelevant. What is at issue here is not whether the states provide generous benefits to their public transit employees, but rather whether the states will be free to determine how to schedule their transit employees and how to pay them overtime.

[52] *FLSA Hearings* at 303 (1965) (testimony of C. Cochran).

[53] *Cf. Fair Labor Standards Amendments of 1973: Hearings on H.R. 4757 and H.R. 2831 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 165 (testimony of C. Cochran), 173-74 (testimony of F. Hill) (1973); S. Rep. No. 300, 93d Cong., 1st Sess. 126 (1973) (minority views of Messrs. Dominick, Taft, and Beall).

> which have long been commonly accepted among local governments of this Nation.

Id. at 850. [54]

Federal regulatory interference with the way state and local governments pay their transit employees goes to the heart of state sovereignty — it endangers their "separate and independent existence." *National League of Cities*, 426 U.S. at 851.

III. The Lower Court's Conclusion Is Consistent With The Recent *United Transportation Union* Decision

The conclusion that local publicly owned mass transit is typical of the activities states have traditionally afforded their citizens is consistent with this Court's decision in *United Transportation Union*. In that case, this Court held that application of the Railway Labor Act to the public employees of the state-owned Long Island Railroad does not violate the Tenth Amendment. The *United Transportation Union* decision follows and expressly affirms this Court's decision in *National League of Cities*. Following a line of prior decisions by the Supreme Court — *Parden* v. *Terminal Railway Co., supra; California* v. *Taylor, supra; United States* v. *California, supra* — this Court held in *National League of Cities* that railroads were not "in an area that the States have regarded as integral parts of their governmental activities." 426 U.S. at 854 n.18.

The statutory scheme in the Railway Labor Act is unlike that in the FLSA because "[r]ailroads have been subject to comprehensive federal regulation for nearly a century." *United Transportation Union*, 102 S. Ct. at 1355 (footnote omitted). "The Railway Labor Act . . . [itself] has provided the framework for collective bargaining between all interstate railroads and their employees for the past 56 years." *Id.* When New York acquired the Long Island Railroad it was aware that the company was subject to federal regulation under the

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[54] It thus follows that determination of the actual effect of federal regulations, of course, is not necessary since it is the states' policy choices that are constitutionally protected.

Railway Labor Act, and "it operated under federal regulation for 13 years without claiming any impairment of its traditional sovereignty." *Id.* at 1356. Therefore, Railway Labor Act coverage continued because the state stepped into an area that had traditionally been subject to comprehensive federal regulation; Congress did not attempt to broaden the Railway Labor Act to bring state and local government employees within its ambit.

The FLSA, by contrast, was expanded in 1966 and 1974, to encroach on state sovereignty, producing immediate objection. Thus, by providing local transit services, the states did not "erode federal authority in areas traditionally subject to federal statutory regulation." *Id.* at 1355. Rather, the federal government sought to extend its power into an activity the states were already conducting and into employment relationships that were historically subject to state and local regulation. Congress did not attempt to apply the FLSA to state and local governments until 1966, and did not attempt to extend its application in full to transit operators until just six years ago, in 1976. [55] State and local governments began to provide transit services prior to the enactment of the FLSA and well before Congress' attempt to extend it to private or public transit. When Congress did act, those actions were challenged in the courts. Therefore, it simply cannot be said that state and local governments entered this area knowing of and accepting the application of the FLSA.

Railroads are perhaps unique among state activities in the extent to which they historically have been subjected to comprehensive federal regulation "for nearly a century." *Id.* (footnote omitted). By contrast, local public mass transit historically has been regulated by state and local governments. [56]

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[55] The 1974 FLSA amendments required overtime compensation of these employees after forty-eight hours per week in the first year after enactment, forty-four hours in the second year, and forty hours thereafter. Pub. L. No. 93-259, § 21(b), 88 Stat. 55, 68 (1974) (codified at 29 U.S.C. § 213(b) (1976)).

[56] See text accompanying notes 34-37, *supra*. The FLSA was even expressly limited to those local mass transit systems "[whose] rates and services . . . are subject to regulation by a State or local agency." 29 U.S.C. § 203(r)(2) (1976).

Furthermore, unlike ownership of the railroads, state and local ownership of transit has become pervasive.[57] While it is true that local public mass transit has become a predominately state-run function only during this century, the Court in *United Transportation Union* was careful to point out that it was not "looking only to the past to determine what is traditional," and that its "emphasis on 'traditional' governmental functions and traditional aspects of state sovereignty was *not meant to impose a static historical view* of state functions generally immune from federal regulation." *Id.* at 1354 (emphasis supplied).

Like other protected activities specified in *National League of Cities*, local publicly owned transit services are "important governmental activities," 426 U.S. at 847, which are "typical of those performed by states and local governments in discharging their dual functions of administering the public law and furnishing public services." *Id.* at 851 (footnote omitted). Indeed, these are precisely the kinds of services that "States traditionally have afforded their citizens." *Id.* Since this Court has held that the federal regulation at issue in this case impermissibly interferes with an essential attribute of state sovereignty, it follows that Congress' attempt to dictate how state and local governments must compensate their local mass transit employees indeed "endangers [their] 'separate and independent existence,' " *United Transportation Union*, 102 S. Ct. at 1355, *quoting National League of Cities*, 426 U.S. at 851.

IV. Alternatively, Application Of The FLSA Requirements To Local Public Transit Is Impermissible In The Absence Of A Constitutionally Valid Amendment To The FLSA

In remanding *National League of Cities* for disposition by the district court, this Court did not reach the question whether the FLSA had to be reenacted in order for its provisions to be applied to a class of unprotected activities. The FLSA coverage of public transit employees was enacted at a time when Congress had not been advised by

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[57] See text accompanying notes 20-21, *supra*.

this Court that it could not establish minimum wage and overtime compensation requirements for all state and local government employees. The FLSA contains a standard severability clause. 29 U.S.C. § 219 (1976). In order to determine whether a severability clause saves application of parts of a statute, one must consider whether Congress would have intended the statute to be in force if it had known it could have enacted only a law as limited as the law passed has become. *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 312-13 (1936). It is not probable that Congress would have intended to enact a law directed only at a small class of public employees. *Cf. Sloan* v. *Lemon*, 413 U.S. 825 (1973). Such federal intervention in wage and hour decisions for a small number of employees and not for others is divisive and may undermine the states' leverage in labor negotiations with employees not directly subject to federal law. Therefore, an alternative reason why the lower court was correct in concluding that the minimum wage and overtime compensation provisions of the FLSA may not be applied to publicly owned local mass transit is that these requirements are not severable from the unconstitutional provisions of the statute.

Motion to Dismiss or Affirm

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Nos. 81-1728 and 81-1735

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RAYMOND J. DONOVAN, Secretary of Labor,
Appellant

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, et al.,
Appellees

JOE G. GARCIA,
Appellant

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, et al.,
Appellees

On Appeal from the United States District Court for the Western District of Texas

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MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), bars application of the minimum wage and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* (1976 & Supp. III 1979) ("FLSA") to the operations of San Antonio Metropolitan Transit Authority because they constitute integral operations in an area of traditional governmental functions?

2. Whether the FLSA's minimum wage and overtime provisions, having been held inapplicable to most state and local government employees in *National League*, are inapplicable to all such employees in the absence of congressional enactment of a constitutionally valid amendment to that Act?

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IN THE

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RAYMOND J. DONOVAN, Secretary of Labor,

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Appellees

On Appeal from the United States District Court for the Western District of Texas

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MOTION TO AFFIRM

Appellee San Antonio Metropolitan Transit Authority ("SAMTA"), pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment of the district court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from a final judgment entered on November 17, 1981, holding that the minimum wage and overtime provisions of the FLSA cannot be constitutionally applied to SAMTA and to local public mass transit systems in the United States. SAMTA does not challenge the jurisdiction of this Court under 28 U.S.C. § 1252 (1976).

An Historical Overview of These Proceedings

The FLSA, as originally enacted in 1938, prescribed minimum-wage, overtime-compensation and child-labor requirements for employees engaged in commerce or in the production of goods for commerce. Specifically excluded were states and their political subdivisions as well as employees of "street, suburban or interurban electric railways, or local trolley or motorbus carriers." Pub. L. No. 75-718, §§ 3(d), 13(a)(9), 52 Stat. 1060, 1067 (1938).

In 1961, the FLSA was amended to extend minimum wage coverage to employees of private electric railways, trolleys and motorbus carriers having gross revenues of one million dollars or more; an overtime exemption for all such employees was simultaneously enacted. Pub. L. No. 87-30, §§ 2(c), 9, 75 Stat. 65, 66, 72 (1961). The exemption from both the minimum wage and overtime provisions was continued for all employees of electric railways, trolleys and motorbus carriers having gross revenues of less than one million dollars. *Id.* § 9. The exemption for public employers remained unchanged.

In 1966, the FLSA was amended to cover states or their political subdivisions with respect to schools, hospitals, and related institutions, and "street, suburban or interurban electric railway[s], or local trolley or motorbus carrier[s] . . . [whose] rates and services . . . are subject to regulation by a State or local agency." Pub. L. No. 89-601, §§102(a) & 102(b), 80 Stat. 830, 831 (1966). The threshold level for coverage was reduced to $250,000, and the overtime exemption for electric railways, trolleys and motorbus carriers was changed to cover operators, drivers and conductors. *Id.* §§ 102(c), 206(c). In 1968, the amendments extending coverage to public schools and hospitals were held constitutional. *Maryland* v. *Wirtz*, 392 U.S. 183 (1968).

In 1974, the FLSA was amended to reach all state and local governments and (in stages) to repeal the overtime exemption for drivers, operators and conductors effective May 1, 1976. Pub. L. No. 93-259, §§ 6(a)(1), 6(a)(6) & 21(b)(1), 88 Stat. 55, 58, 68 (1974). The amendments applying the FLSA to state and local government employees were challenged as being unconstitutional, and this Court

agreed, holding that "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art I, § 8, cl. 3." *National League, supra*, at 852. The Court did not identify all state activities that are constitutionally protected, but listed by way of example "fire prevention, police protection, sanitation, public health, and parks and recreation." *Id.* at 851. In overruling *Maryland* v. *Wirtz*, the Court also extended constitutional immunity to schools and hospitals. 426 U.S. at 855. The only activity identified as not being immune was a state-operated railroad. *Id.* at 854 n.18. Public transit was not mentioned.

On remand, the three-judge court recognized that the decision did not provide an exhaustive list of exempt activities and left a gray area for future resolution. *National League of Cities* v. *Marshall*, 429 F. Supp. 703, 705-06 (D.D.C. 1977). The court expressed concern over potential monetary liability of government employers in this gray area, and in response, the Secretary of Labor issued regulations (29 C.F.R. §§775.2 & 755.3) under which the Wage and Hour Administrator is to determine those operations against which he will seek to enforce the FLSA and to publish those determinations as amendments to section 775.3(b).

By letter dated September 17, 1979, to the Amalgamated Transit Union, the Deputy Wage and Hour Administrator concluded that "publicly operated local mass transit systems such as the San Antonio Transit System [SAMTA's municipally-owned predecessor] . . . are not within the constitutional immunity of the Tenth Amendment as defined by the Supreme Court in *National League*. . . ." On November 21, 1979, SAMTA filed this action for a declaratory judgment that the minimum wage and overtime provisions of the FLSA are inapplicable to its operations. SAMTA was then sued by 341 of its operators (later joined by 376 more) for alleged unpaid overtime and liquidated damages. The employees' action was stayed pending disposition of the constitutional issue in SAMTA's suit. The Secretary of Labor counterclaimed against SAMTA for backpay and injunctive relief, and the American Public Transit Association ("APTA") and Joe G. Garcia, one of SAMTA's employees, were permitted to

intervene.[1] A hearing on cross-motions for summary judgment was held on September 10, 1981. The district court's judgment in favor of SAMTA and APTA (which is reproduced as an appendix to the jurisdictional statements) was issued on November 17, 1981. A majority of the courts to consider this issue have held transit to be exempt.[2]

Facts About Local Public Mass Transit in San Antonio[3]

Publicly owned transit has existed in San Antonio since 1959. In that year, the City of San Antonio acquired the San Antonio Transit Company and began providing transit as a municipal service through the newly created San Antonio Transit System ("SATS").[4] The

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[1] Contrary to the assertion in his jurisdictional statement (p. 16 n.11), Garcia was not permitted to intervene "just before the court's ruling on summary judgment." Intervention was granted on July 13, 1981 — almost 2 months before the summary judgment hearing. Forty-nine days following his intervention and 10 days before the hearing, Garcia belatedly decided to initiate discovery, and sought a postponement, which was properly denied. SAMTA's records are available to the public under the Texas Open Records Act, Tex. Rev. Civ. Stat. Ann. art. 6252-17a (Vernon Supp. 1982), and Garcia was furnished with records requested by him under that Act in June, 1980.

[2] *Accord, Dove* v. *Chattanooga Area Regional Transp. Auth.*, Civ. A. No. 1-80-249 (E.D. Tenn. 1981), *appeal docketed*, No. 81-5636 (6th Cir. Sept. 2, 1981); *Alewine* v. *City Council of Augusta, Georgia*, 505 F.Supp. 880 (S.D. Ga. 1981), *appeal docketed*, No. 81-7490 (11th Cir. June 5, 1981); *Francis v. City of Tallahassee*, No. 79-446 (2d Cir. Fla. 1980). *Contra, Kramer v. New Castle Area Transit Auth.*, No. 81-2223 (3d Cir. Apr. 30, 1982); *Joiner v. City of Macon*, Civ. A. No. 79-287-MAC (M.D. Ga. 1981), *appeal docketed*, No. 81-7789 (11th Cir. June 14, 1981).

[3] Unless another citation is given, the facts are taken from the affidavit of Wayne Cook, which is part of the record below.

[4] Garcia's jurisdictional statement (p. 8) gives the erroneous impression that the City may have created SATS for the purpose of making money. As newspaper articles at the time indicate, this was not the case. According to an article in The San Antonio Light on December 23, 1958, negotiations between the City and the transit company for a new franchise to replace the one expiring May 1, 1959, broke down over increased fares and "inadequate city control over future fare increases." As a result, the City called a bond election to purchase the system. The San Antonio Light December 23, 1958, at A1, col. 1 & A4, col. 1. An article in The Light on January 11, 1959, recites that "if voters veto the bond issue the city will be forced to grant a new franchise to the present company on the company's terms . . . [which] would almost certainly include continued increases in fares"; that the transit company

City's purchase was financed by revenue bonds, and no federal funds were involved in the acquisition. During the last several years of its existence, SATS was heavily dependent upon subsidies provided by the City and the federal government. See Garcia's Appendix below at 37.

In 1973, the Texas Legislature enacted article 1118x, Tex. Rev. Civ. Stat. Ann. (Vernon Supp. 1982), which authorizes the establishment of metropolitan rapid transit authorities. Under that article, the governing body of the principal city in a metropolitan area is authorized to initiate proceedings to create a transit authority, to hold public hearings and to adopt an ordinance creating the authority and prescribing the territory to be included. *Id.* § 3. The authority is then confirmed by a vote of the local electorate. *Id.* § 5. Once confirmed, the authority constitutes a "public body corporate and politic, exercising public and essential governmental functions. . . ." *Id.* § 6(a).[5]

SAMTA is a transit authority created under article 1118x by the City Council of San Antonio on February 3, 1977. An election was thereafter held on November 8, 1977 among "the qualified voters within the authority" (*id.* § 5(d)), confirming SAMTA's creation and

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intends "to double the fares of school children"; and that "the city held that fares should be reduced rather than increased." The article also mentions a newsletter from the research and planning council and states that public transit "is a declining industry due to increasing costs, declining patronage and vanishing profits," which can result in "deficits and subsidies . . . [that] have to be provided for out of taxes." The article closes by stating that "City officials are well aware of these complications. But they simply see no alternative to municipal ownership unless public transportation is to be discontinued. Because this is an issue of broad public policy they have referred the question to the voters." *Id.* Jan. 11, 1959, at A1, col. 1 & A4, col. 1.

[5] Under article 1118x, an authority can, among other things, exercise the right of eminent domain; establish and maintain fares (subject after August 31, 1981 to approval by a Local Government Approval Committee); make all rules and regulations governing use, operation and maintenance of the system; issue bonds and notes; levy and cause to be collected motor vehicle emission taxes; levy, collect and impose a local sales and use tax; and levy and collect any kind of tax other than an ad valorem tax on property which is not prohibited by the Texas constitution. *Id.* §§ 6, 6E, 7, 8, 11A, 11B. An authority *must* provide service to incorporated cities and towns, and unincorporated portions of the county or counties, adjacent to its service area if the electorate of such adjacent area votes for annexation into the authority's jurisdiction. *Id.* § 6A.

authorizing SAMTA to levy a one-half percent sales tax. SAMTA then purchased the facilities and equipment of SATS from the City of San Antonio and commenced operations on March 1, 1978. SAMTA funded the purchase through bonds secured by its revenues and certain property. No federal funds were used.

SAMTA operates within Bexar County, Texas and serves the City of San Antonio, other suburban cities and most parts of Bexar County. When it commenced operations on March 1, 1978, its service area encompassed 276.03 square miles and a population in excess of 850,000 people. By July 7, 1980, its service area comprised 1,197.43 square miles with a population exceeding 923,000 people.

During its first two fiscal years, SAMTA's regularly scheduled line-service buses carried approximately 63.4 million passengers and were operated more than 26.5 million bus miles. Of these passengers, approximately 5.3 million were senior citizens, 1.5 million were handicapped persons and 14.6 million were elementary, junior high, high school and college students, including children under 12. Approximately 3.3 million other student passengers were transported to and from school by SAMTA on nonline school bus service pursuant to arrangements with two Bexar County school districts. It is estimated that at least two-thirds of all passengers riding SAMTA's regular line-service buses are travelling to or from school or their jobs. SAMTA also serves the needs of the elderly and handicapped through a fleet of lift-equipped vans that operate throughout SAMTA's service area. When briefs were filed with the court below, SAMTA was carrying approximately 350 mobility-impaired persons per day at a nominal fare of 50¢ per trip and an operational cost averaging approximately $8.50 for each passenger trip. SAMTA also provides regular line service for most of the hospitals in its service area.

SAMTA is operated almost entirely with local sales taxes, federal funds and fare box receipts. Fares charged to passengers are nominal, ranging (at the time of the briefs below) from no charge for the smaller El Centro buses that encircle the downtown area, up to 60¢ per ride for the longest runs, with children and the elderly and handicapped paying 10¢. The average fare was 18¢. For SAMTA's first two fiscal years, total revenues from line-service fares were approximately $10.1 million, as compared to total operational expenses for such

services of approximately $41.6 million.[6] SAMTA thus had an operational deficit of approximately $31.5 million, which was satisfied from sales taxes totalling approximately $26.8 million, operational grants of approximately $12.5 million from the Urban Mass Transportation Administration, and other operational revenues of approximately $0.7 million.

Since it began operations in 1978, SAMTA has substantially increased the level of service previously provided by SATS. When SAMTA commenced operations, SATS had a fleet of 272 line-service buses, serving 40 routes. At the time briefs were filed below, SAMTA had 401 line-service buses serving 70 routes.

ARGUMENT

I. SAMTA IS PERFORMING A TRADITIONAL GOVERNMENTAL FUNCTION

In *National League*, this Court held that the States' power to determine their employees' wages, hours and overtime compensation is an "undoubted attribute of state sovereignty." 426 U.S. at 845. It identified the question before it as being whether determinations of wages, hours and overtime "are 'functions essential to [the States'] separate and independent existence,' . . . so that Congress may not abrogate the States' otherwise plenary authority to make them." *Id.* at 845-46.[7] The Court discussed the effect the FLSA amendments

[6] In his jurisdictional statement (pp. 21-22), Garcia claims that SAMTA is "substantially financed by fares." This is false, as evidenced by the fact that fares constituted less than 25% of SAMTA's operating expenses for its first two fiscal years. In comparison, user charges as a percent of total costs in 1976-77 in the nation's 48 largest cities for other activities exempted by *National League* were 38% for sewage, 34% for hospitals and 27% for institutions of higher education. Institute of Pub. Admin., *Financing Transit: Alternatives for Local Government*, 228 tab. 10-2 (1979, prepared for the U.S. Dep't of Transp.).

[7] The Government's jurisdictional statement (p. 11) contends that for *National League* immunity to attach, a state activity must itself be "essential to [the] separate and independent existence." In making this argument, the Government has misread *National League* which posited the question before it as whether the *determination of wages, hours and overtime compensation* is essential to separate and independent existence. If a state activity had to meet this "essentiality" standard, then parks and recreation, and probably even hospitals, would not be immune. Similarly, libraries and museums, which the Secretary of Labor has exempted by regulation (29 C.F.R. § 775.4), could not be exempt.

would have on fire and police protection, but, noting disagreement among the parties as to the "precise effect the amendments will have in application," concluded that "particularized assessments of actual impact are [not] crucial to resolution of the issue presented. . . ." *Id.* at 851.[8] The Court then held that "application [of the FLSA amendments] will nonetheless significantly alter or displace the States' abilities to structure employer-employee relationships" with respect

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[8] Garcia (jurisdictional statement pp. 14-15, 21) questions the FLSA's impact on SAMTA and transit in the United States. Impact of the FLSA requirements is not a proper consideration in determining what activities are traditional, since the Court, in *National League*, has already decided that the FLSA amendments have sufficient effect to preclude their constitutional application with respect to traditional activities because they displace state "choices" regarding the wages and hours of their employees. 426 U.S. at 850. This is evident from the Court's summary, and generic, exemption of several activities without any impact analysis (*i.e.*, parks and recreation, sanitation, public health, and hospitals). If impact analysis were relevant in determining whether an activity is traditional, then a specific impact analysis would have been required for each of the activities exempted and, presumably, for each government unit providing each type of activity.

Even if impact on transit were considered, however, Garcia's test for immunity would be satisfied. Garcia's own jurisdictional statement (p. 20) recites that the FLSA cases involving transit will have "a potential impact on the livelihood of thousands of public transit employees." The actual impact on transit is evident from the many lawsuits currently pending against public transit systems for back overtime pay and the administrative investigations which, according to the Government, were in progress when it filed its memorandum below seeking a partial stay pending appeal. The actual impact on SAMTA is evident from the fact that 717 bus drivers are suing SAMTA for back pay, and from the affidavit of Wayne Cook that peak passenger loads create fluctuating manpower needs during SAMTA's operational hours and require that regular drivers be scheduled for shifts ranging between 8 hours and 8 hours 45 minutes, making it extremely difficult to limit drivers to 8 hour shifts "without seriously disrupting service to transit passengers." The potential impact on state wage and hour determinations also is significant. FLSA application would straitjacket local governments into complying with the minimum wage and overtime requirements prescribed by the federal government, thereby forfeiting the right to structure essential transit services by making changes in wage and hour policies, as local needs dictate. The possibility that the States may need a great deal of flexibility to restructure their employment practices is portend[illegible]by the Administration's plan to eliminate transit operational assistance beginnin[illegible] in 1983. *Major Themes & Budget Details Fiscal Year 1983* at 121-22 (Executive Office of the President, Office of Management & Budget [referred to herein as *"Budget Details 1983"*]).

to activities "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." *Id.* The Court observed that "[i]f Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' 'separate and independent existence.' " *Id.*

In the wake of *National League*, the only task remaining for the courts in FLSA cases is to complete the "catalogue of the numerous line and support activities which are well within the area of traditional operations of state and local governments," *id.* at 851 n.16, and to which the FLSA cannot be applied. Thus the only issue before the Court (other than the separability question, see Part II, *infra*) is whether SAMTA (and local public mass transit) is one of these traditional functions. Transit is not materially different from the other activities exempted in *National League*, and the appellants' claims to the contrary simply do not present a substantial question warranting further argument, particularly in view of the Court's unanimous decision in *United Transportation Union* v. *Long Island Rail Road*, 102 S.Ct. 1349 (1982) (*"LIRR"*).

In *LIRR*, the Court held that the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.* (1976), can be constitutionally applied to a "[state owned] railroad engaged in interstate commerce," but acknowledged that "under *most* circumstances federal power to regulate commerce [cannot] be exercised in such a manner as to undermine the role of the States in our federal system." 102 S.Ct. at 1354 (emphasis added). Although *LIRR* involved a different statute raising different considerations from the FLSA, the factors upon which the Court's decision turned reinforce the propriety of the decision below.

In *LIRR*, the Court focused upon four important circumstances existent with railroads, which are glaringly absent in the case of SAMTA and local mass transit: (1) Railroads are part of a national rail network requiring uniform federal regulation; (2) Railroads have been subject to comprehensive, long-standing federal regulation; (3) There is no comparable history of state regulation of railroads; and (4) State-owned passenger railroads are the exception rather than the norm. The Court also emphasized that the Long Island Railroad

voluntarily operated under the RLA without any claim of disruption. The facts and authorities which follow demonstrate that each of these elements is inapplicable to SAMTA. They also show that appellants' argument based upon federal financial assistance to transit is ill-conceived and patently invalid.

A. SAMTA Is Engaged in a Purely Local Activity.

In *LIRR*, the Court emphasized the interstate nature of railroads and their role as a component part of the national rail system. Thus, the Court noted that the Long Island Railroad "connects with lines of railroads which serve other parts of the country[,] . . . supplies Long Island's only freight service [and] does a significant volume of freight business." *Id.* at 1351 n.1. The Court concluded:

> [T]he Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system. In particular, Congress long ago concluded that federal regulation of railroad labor relations is necessary to prevent disruptions in vital rail service essential to the national economy. A disruption of service on any portion of the interstate railroad system can cause serious problems throughout the system. Congress determined that the most effective means of preventing such disruptions is by way of requiring and facilitating free collective bargaining between railroads and the labor organizations representing their employees.
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> . . . To allow individual States, by acquiring railroads, to circumvent the federal system of railroad bargaining, or any of the other elements of federal regulation of railroads, would destroy the uniformity thought essential by Congress and would endanger the efficient operation of the interstate rail system. [*Id.* at 1355-56.]

Unlike a railroad, SAMTA provides a purely local service. It serves only Bexar County in which two-thirds of its passengers are going to or from work or school. During its first two fiscal years, approximately twenty percent of its local line-service passengers were students or children, and another 3.3 million students were carried on nonline service under arrangements with school districts.[9] The local character of SAMTA's activities is also evident from the

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[9] In this respect, SAMTA is engaged in an activity integral to education.

fact that it serves Bexar County hospitals and provides mini-bus service in the downtown area.

Unlike the railroad industry, there is no national transit system; nor has Congress ever concluded that "uniformity" in transit is essential. In fact, the contrary is evident from the Administration's plan to eliminate transit operating subsidies:

> Primary responsibility for mass transit should remain with State and local governments. *Decisions about* service levels, equipment and facilities, fares, *wage rates* and management practices *are better left to local decision-makers*. Excessive levels of Federal assistance unfortunately lead to excessive Federal interference in these local decisions. [*Budget Details 1983* at 121 (emphasis added)]

Any disruption of a transit system is a purely local problem which, unlike an interstate railroad, has no impact on other local transit systems serving other localized areas of the nation.

Appellants' references in their jurisdictional statements (Government p. 15; Garcia pp. 10, 24) to the Urban Mass Transportation Act's characterization of the decline of transit services as a national problem requiring a "national program" and a "partnership" between the States and federal government does not enhance their position one whit since Congress has made the same observations about virtually all of the other activities exempted by *National League*. *E.g.*:

Health and Hospitals: Safe Drinking Water Act, 42 U.S.C. § 300f, *et seq.* (1976 & Supp. III 1979), establishes a "joint Federal-State system for assuring compliance with these standards" (H.R. Rep. No. 1185, 93d Cong., 2d Sess. 1, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6454, 6455). National Health Planning & Resources Development Act of 1974, 42 U.S.C. § 300k, *et seq.* (1976 & Supp. III 1979), will "assure the development of a national health policy"; Hill-Burton Act, 42 U.S.C. § 291, *et seq.* (1976), providing for hospital construction was a "Federal-State partnership"; "national guidelines" for health planning are needed; it is the "responsibility of the Federal government to intervene" to upgrade large urban hospitals (S. Rep. No. 1285, 93d Cong., 2d Sess. 1, 19, 42, 59, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7842, 7859, 7882, 7898).

Sanitation: Solid Waste Disposal Act, Pub. L. No. 89-272, Title II, 79 Stat. 997 (1965), requires that "immediate action must be taken to initiate a national program directed toward finding and applying new solutions to the waste disposal problem"; "[t]he problem of solid waste disposal is all-pervasive and has become national in scope . . . [and] will require the combined resources of the Federal, State and local governments as well as industry and research institutions" (H.R. Rep. No. 899, 89th Cong., 1st Sess. 7, 22, *reprinted in* 1965 U.S. Code Cong. & Ad. News 3608, 3614, 3627). "[P]roblems of waste disposal . . . have become a matter national in scope. . . ." (Resource Conservation & Recovery Act of 1976, 42 U.S.C. § 6901(a)(4) (Supp. III 1979)).

Education: The "purpose of the Elementary & Secondary Education Act of 1965, 20 U.S.C. § 236, *et seq.* (1976 & Supp. III 1979) "is to meet a national problem" (S. Rep. No. 146, 89th Cong., 1st Sess. 4, *reprinted in* 1965 U.S. Code Cong. & Ad. News 1446, 1449).

Fire: "Fire is a major national problem" (S. Rep. No. 470, 93d Cong., 1st Sess. 6, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6191, 6196). The federal government is a "partner in attaining" the goal of improving the quality of local fire service delivery (Advisory Commission on Intergovernmental Relations, *The Federal Role in Local Fire Protection* 18 (1980)).

Police: "Crime is a national catastrophe"; "there are certain national objectives which are vital to every citizen of this country, and the elimination of crimes is one of the foremost among these national objectives" (S. Rep. No. 1097, 90th Cong., 2d Sess. 31, 179, *reprinted in* 1968 U.S. Code Cong. & Ad. News 2112, 2117, 2239). The role of the Law Enforcement Assistance Administration is a "partner with State and local governments" (S. Rep. No. 1253, 91st Cong., 2d Sess. 14, *reprinted in* 1970 U.S. Code Cong. & Ad. News 5804, 5805). [10]

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[10] Garcia's reliance (jurisdictional statement p. 11) on the fact that some transit systems are in multistate urban areas is also misplaced since multistate cooperation is essential for many of the activities exempted by *National League*. *E.g.*, S. Rep. No. 96, 96th Cong., 1st Sess. 33-34, *reprinted in* 1979 U.S. Code Cong. & Ad. News 1306, 1338-39 (of 205 health service areas, 15 are interstate, one is tristate and 13

B. Local Public Mass Transit Has Not Been Subject to Comprehensive and Long-Standing Federal Regulation.

In *LIRR*, the Court relied heavily on the fact that "[r]ailroads have been subject to comprehensive federal regulation for nearly a century." 102 S. Ct. at 1355. The Court concluded that "there is no justification for a rule which would allow the States, by acquiring functions previously performed by the private sector, to erode federal authority in areas *traditionally subject to federal statutory regulation*." *Id.* (emphasis added).

Unlike the "national rail system," *LIRR*, 102 S. Ct. at 1355, mass transit has been subject to minimal federal regulation no greater than the activities specifically exempted by *National League*. There is no scheme of federal regulation intended to provide uniformity among transit systems, as in the case of railroads, which have an array of federal laws aimed directly at their operations.

The federal statutes cited by the Government do not support the hypothesis that the federal government has adopted comprehensive, long-standing regulation of transit. The National Labor Relations Act, 29 U.S.C. § 151, *et seq.* (1976 & Supp. III 1979), and therefore the Labor Managment Reporting & Disclosure Act, 29 U.S.C. § 401, *et seq.* (1976) (see definition of "employer," *id.* § 402(e)),

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encompass interstate SMSA's); S. Rep. No. 11, 88th Cong., 1st Sess. 5, *reprinted in* 1963 U.S. Code Cong. & Ad. News 664, 667 (Secretary of Interior should "encourage interstate and regional cooperation in planning, acquisition and development of outdoor recreation resources"); *History of Public Works in the United States 1776-1976* at 416, 418 (American Public Works Association 1976 [referred to herein as *"History of Public Works"*]) (interstate compacts have offered a more effective means of promoting regional water pollution control . . . the 1948 Water Pollution Control Act (Pub. L. No. 80-845, 62 Stat. 1155 (1948)) provided for "interstate cooperation"); H.R. Rep. No. 899, 89th Cong., 1st Sess. 8, 27, *reprinted in* 1965 U.S. Code Cong. & Ad. News 3608, 3615, 3634 (federal assistance is needed to encourage and help the states and interstate agencies undertake surveys of solid waste and develop plans on a "statewide or interstate basis" . . . "interstate cooperation" is needed); Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1288(a)(3) (1976) (providing for "areawide waste treatment management plans" for multistate areas); Resource Conservation & Recovery Act of 1976, 42 U.S.C. § 6946(c) (1976) (providing for "interstate [solid waste disposal] regions"); Crime Control Act of 1973, Pub. L. No. 90-351, 82 Stat. 197, 199, 42 U.S.C. § 3731(b)(9) (amended 1979) (providing "interstate metropolitan regional planning units").

apply to all of the activities exempted in *National League* when performed by private sector employers. *E.g.*, *Crestline Memorial Hospital Association, Inc.* v. *NLRB*, 668 F.2d 243 (6th Cir. 1982); *Champlain Security Services, Inc.*, 243 NLRB 755 (1979); *Nichols Sanitation, Inc.*, 230 NLRB 834 (1977); *Tulane University*, 195 NLRB 329 (1972). The Equal Pay Act ("EPA") (29 U.S.C. § 206(d) (1976)) and Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.* (1976 & Supp. III 1979)) apply even to public employers providing activities exempted by *National League*. *E.g.*, *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976) (upholding Title VII's application to the States); *Pearce* v. *Wichita County Hospital Board*, 590 F.2d 128 (5th Cir. 1979) (applying EPA to a public hospital). [11]

The Government's citation of the FLSA as a statute that has long applied to transit (specifically the 1961 and 1966 amendments) is misleading. Private transit systems were by statute exempt before 1961. The 1961 amendments extended the FLSA only to private systems with revenues exceeding one million dollars, but even then exempted all employees from the overtime requirements. Even the 1966 amendments continued the overtime exemption for operators. It was not until 1976 that transit (even private transit) was brought fully under the FLSA's overtime requirements, but this was pursuant to the 1974 amendments, which are under challenge in this action and certainly cannot provide bootstrap support for the Government's position. The vast majority [12] of transit employees (public and private) have been subject to the full play of the FLSA only since 1976, and this hardly constitutes long-standing or comprehensive federal

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[11] Public mass transit in San Antonio and Texas has been and continues to be subject to various state laws regulating the labor relations of public employees. *E.g.*, Tex. Rev. Civ. Stat. Ann. art. 5154c (Vernon 1971) (prohibiting strikes and collective bargaining); art. 6252-14 (Vernon 1971) (age discrimination); art. 6252-16 (Vernon 1971 & Supp. 1982) (discrimination because of race, religion, color, sex or national origin). *See also Amalgamated Transit Union Local Div. 1338* v. *Dallas Pub. Transit Bd.*, 430 S.W.2d 107 (Tex. Civ. App. — Dallas 1968, writ ref'd n.r.e.), *cert denied*, 396 U.S. 838 (1969).

[12] During SAMTA's first fiscal year, operators' salaries and wages were approximately $6.62 million or about 69% of $9.6 million in total salaries or wages, which shows that the vast majority of SAMTA's employees are operators. Garcia's Appendix below at 62.

regulation of wage and hour practices or any other aspect of transit operations.

C. There *Is* Long-Standing State Regulation of Local Transit.

In holding the Long Island Railroad to be nontraditional, the Court also relied upon the fact that "[t]here is no comparable history of longstanding state regulation of railroad collective bargaining or of other aspects of the railroad industry." 102 S. Ct. at 1355. The reverse is true with respect to transit in Texas and San Antonio, which exemplify a long-standing tradition in the area of public transit regulation. State and local regulation of transit in Texas dates back to at least 1913 — almost 70 years. In that year, an enabling act was passed by the Texas legislature delegating to the cities exclusive control over their streets and highways, including the powers:

> To license, operate and control the operation of all character of vehicles using the public streets, including motorcycles, automobiles and like vehicles, to prescribe the speed of the same, the qualification of the operator of the same, and the lighting of the same by night and to provide for the giving of bond or other security for the operation of the same.
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> To regulate, license and fix the charges of fares made by any person owning, operating or controlling any vehicle of any character used for the carrying of passengers for hire . . . ." [1913 Tex. Gen. Laws, ch. 147, § 4, at 314, *as codified*, Tex. Rev. Civ. Stat. Ann. art. 1175, §§ 20, 21 (Vernon 1963)]

In 1915, the City of San Antonio passed a comprehensive ordinance to regulate all types of vehicles operated for hire to transport passengers. San Antonio, Tex., Ordinance OF1-1 (Mar. 8, 1915). The ordinance required owners of vehicles, including motor buses, to obtain a franchise from the city for transporting passengers for hire on city streets; established license application and fee specifications, and insurance or bond requirements; and specified vehicle safety features such as lighting, speed and driver age and conduct. Another comprehensive ordinance was enacted in 1921, updating the 1915 ordinance and including a designated motor bus route and terminals. San Antonio, Tex., Ordinance OF-266 (Dec. 1, 1921).

The City continued to regulate private transit companies by ordinance as to fares, routes, schedules and franchises until 1959, when it

created SATS. The City purchased the assets of SATS' predecessor pursuant to a state law, passed two years earlier, authorizing cities to issue bonds for the purchase, construction or improvement of street transportation systems. Tex. Rev. Civ. Stat. Ann. art. 1118w (Vernon 1963). Public mass transit in San Antonio changed again after state legislation in 1973 authorized a change from a municipal to a metropolitan facility. Tex. Rev. Civ. Stat. Ann. art. 1118x (Vernon Supp. 1982). The growth of transit in San Antonio, starting with a city-controlled private franchise, changing to a city-owned system in 1959, and culminating in an autonomous metropolitan authority in 1978, illustrates the traditional role of the city and state in providing and regulating efficient transportation for the convenience and welfare of local citizens. [13]

D. State and Local Government Have Become the Traditional Providers of Local Public Mass Transit in Texas and the United States.

In finding the Long Island Railroad not to be a traditional function of state government, the Court noted that only two of seventeen commuter railroads in the United States are public. One of those was the Long Island itself, which was converted from a "private stock corporation to a public benefit corporation" in 1980. 102 S. Ct. at 1352. The other was the Staten Island which became public in 1971. *Id.* at 1354 n.12. *See also Employees of the Department of Public Health & Welfare* v. *Missouri Department of Public Health & Welfare*, 411 U.S. 279, 285 (1973) (state-owned railroad in *Parden* v.

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[13] Other Texas statutes regulating intracity bus systems are Tex. Rev. Civ. Stat. Ann. art. 1015 (Vernon 1963) (authorizing governing bodies of cities to license, tax and regulate omnibus drivers); art. 1181 (Vernon Supp. 1982) (*original version at* 1913 Tex. Gen. Laws, ch. 147, § 9, at 317) (confirming that cities have exclusive power to grant franchises for the use of public streets); art. 6663c (Vernon 1977 & Supp. 1982) (authorizing state assistance to cities for establishment of mass transit systems); art. 6675a-2 (Vernon 1977) (providing for registration of motor vehicles); art. 6675a-5 (Vernon Supp. 1982) (setting annual license fees for street and suburban buses); art. 6675a-13 (Vernon 1977) (establishing license plate requirements for motor vehicles required to be registered); art. 6687b, § 5 (Vernon 1977) (establishing requirements for drivers of motor vehicles used as school buses); art. 6698 (Vernon 1977) (authorizing incorporated towns to collect city permit fees on motor vehicles transporting passengers for hire).

Terminal Railway Co., 377 U.S. 184 (1964) was "a rather isolated state activity"). [14]

In *LIRR*, the Court stated that it was not imposing a "static historical view of state functions generally immune from federal regulation." 102 S. Ct. at 1354. [15] This is consistent with the decision of the district court extending immunity to SAMTA and public mass transit.

Local transit in San Antonio has been publicly owned and operated since 1959. In 1979 there were eighteen transit systems in Texas operating five or more vehicles in scheduled, fixed route, intracity service; all eighteen were publicly owned. *1979 Texas Transit Statistics* 1 (Tex. Dep't of Hwys. & Pub. Transp. 1980). Nationally, 94% of all transit riders use public mass transit. APTA *Transit Fact Book 1981* at 27. The figures in appellants' jurisdictional statements

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[14] Commuter railroads are not even considered part of mass transit. D. Barnum, *From Private to Public: Labor Relations in Urban Transit*, 25 Indus. & Lab. Rel. Rev. 95 (1971): "The urban transit industry includes all 'companies and systems primarily engaged in local and suburban mass passenger transportation over regular routes and on regular schedules' *except commuter railroads* and limousine service. . . ." [emphasis added]

[15] In their jurisdictional statements (Government p. 11, Garcia p. 19), appellants contend that an historical approach should be taken in determining *National League* immunity. The *LIRR* decision repudiates this contention and is in keeping with earlier Supreme Court pronouncements. *See, e.g., Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60, 75 (1978) ("[v]iable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions"); *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68 (1955) ("it is hard to think of any governmental activity on the 'operational level' . . . which is 'uniquely governmental,' in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed"); *Helvering* v. *Gerhardt*, 304 U.S. 405, 427 (1938) (Justice Black, concurring) (there "cannot be any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been non-governmental. . . . [T]he people — acting . . . through their elected legislative representatives — have the power to determine as conditions demand, what services and functions the public welfare requires"). *See also* W. Owen, *The Metropolitan Transportation Problem*, 4-5 (1966) ("[t]oday, nine-tenths of the mounting expenses of city governments are for services that did not exist at the turn of the century — traffic engineering, airports, parking facilities, health clinics and a long list of others").

(Government p. 12 n.20, Garcia p. 13 n.7) showing that roughly half of the transit systems in cities over 50,000 population are public is misleading since the 686 systems in question include the smallest, with only one bus, and the largest with over 2000 buses. The publication from which these figures are taken reflects that the principal provider of transit services in each of the 25 largest urbanized areas in the United States and in at least 100 of the 106 urbanized areas having populations exceeding 200,000 is public. *Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas Over 50,000 Population* (Department of Transportation 1981). [16]

It is also clear that the States regard transit "as [an] integral part[] of their governmental activities" which is another test for *National League* immunity. 426 U.S. at 854 n.18. [17] Article 1118x provides

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[16] By comparison, in 1974, of the nation's 8,297 hospitals, only 3,180 were owned by the federal, state or local government. *History of Public Works* 490. Bexar County has 20 hospitals — 5 public and 15 private, including 5 investor-owned for profit. *American Hospital Association, Guide to Health Care Field*, at A-218-19 (Am. Hosp. Ass'n. 1980). Of their 6,334 beds, 3,955 are in private hospitals. *Id.* Substantial private involvement also exists in parks and recreation. *See History of Public Works* 553, 554 (according to a 1965 survey, 85,000 commercial enterprises provided outdoor recreational opportunities on 23 million acres, 46,000 more provided outdoor recreation facilities related to amusement and spectator sports on 18 million acres, and one million nonprofit enterprises were provided by 47,000 private and quasi-private nonprofit organizations on 7 million acres). *See also Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 159 n.8 (1978) (recreational parks are not an "exclusively public function," Court noting private sector involvement).

[17] The fact that local public mass transit is an essential governmental activity, no different from the other activities exempted in *National League*, is evident from the legislative histories of the federal urban mass transit legislation. *E.g., Metropolitan Mass Transportation Legislation: Hearings Before Subcomm. No. 1 of the House Comm. on Banking and Currency*, 86 Cong., 2d Sess. 14, 26 (1960) ("it is as necessary to provide transportation for these new communities as it is to provide other public necessities such as water, sewers, police and fire protection, and so forth" [statement of Rep. Addonizio] . . . "it is a vital public necessity that such service be provided, as necessary to economic life of the community as the provision of water, police and fire protection and other recognized public necessities" [statement of Rep. Corbett]); 120 Cong. Rec. 1042 (1974) ("mass transit is as much an essential public service as the fire department or hospitals" [statement of Sen. Biden]).

that metropolitan transit authorities are "essential governmental functions"[18] and are not "proprietary," *id.* §§ 6(a), 13A. Article 6663c, § 1(a)(2), Tex. Rev. Civ. Stat. Ann. (Vernon 1977), provides that "[p]ublic transportation is an essential component of the state's transportation system. . . ."

Perhaps most apposite to transit are the Court's observations in *Brush* v. *Commissioner of Internal Revenue*, 300 U.S. 352 (1937), tracing the evolution of private water service into an essential function of government:

> We conclude that the acquisition and distribution of a supply of water for the needs of the modern city involve the exercise of essential governmental functions. . . .
>
> We find nothing that detracts from this view in the fact that in former times the business of furnishing water to urban communities, including New York, in fact was left largely, or even entirely, to private enterprise. The tendency for many years has been in the opposite direction, until now in nearly all the larger cities of the country the duty has been assumed by the municipal authorities. Governmental functions are not to be regarded as non-existent because they are held in abeyance, or because they lie dormant, for a time. If they be by their nature governmental, they are nonetheless so because the use of them has had a recent beginning. [*Id.* at 370-71.][19]

Although public mass transit, like water service, may have at one time been left largely to private enterprise, it has evolved into an

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[18] For other state laws decreeing public mass transit to be an essential function of government and showing that the concept embodied in article 1118x is not unique to Texas, *see Inman Park Restoration, Inc.* v. *Urban Mass Trans. Admin.*, 414 F. Supp. 99, 104 (N.D. Ga. 1975), *aff'd*, 576 F.2d 573 (5th Cir. 1978); *Henderson* v. *Metropolitan Atlanta Rapid Transit Auth.*, 225 S.E.2d 424, 427 (Ga. 1976); *Mass Transit Admin.* v. *Baltimore County Revenue Auth.*, 298 A.2d 413, 415 (Md. Ct. App. 1973); *Teamsters Local 676* v. *Port Auth. Transit Corp.*, 261 A.2d 713, 716 (N.J. Sup. 1970); *County of Niagara* v. *Levitt*, 411 N.Y.S.2d 810, 812 (Sup. N.Y. 1978); *Pennsylvania* v. *Erie Metropolitan Transit Auth.*, 281 A.2d 882, 885 (Pa. 1971).

[19] The question in *Brush* was whether the salary of a city official was subject to federal income taxes. The Court concluded it was not, based upon its holding that the city was performing an essential governmental function in furnishing water to the public. Although the Court's ruling on the income tax question is no longer valid in

essential function of state and local government, and this Court's conclusions are no less applicable to transit today than they were to water service forty-five years ago. [20] *See also Amersbach* v. *City of Cleveland*, 598 F.2d 1033, 1037 (6th Cir. 1979) (extending FLSA immunity to a municipal airport and holding that the "terms 'traditional' or 'integral' are to be given a meaning permitting expansion to meet changing times."). [21]

E. SAMTA Has Never Acceded to FLSA Coverage of Its Operations.

In *LIRR*, the Court relied on the fact that the "State knew of and accepted" the RLA and "operated under [it] for 13 years without claiming any impairment of its traditional sovereignty." 102 S. Ct. at 1356. In fact, when the railroad in *LIRR* was sued for a declaratory judgment that the RLA rather than the New York Taylor Law applied, its response "was to acknowledge that the Railway Labor Act ap-

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view of subsequent decisions upholding federal taxation of local government officials even when they are performing sovereign governmental functions, the Court's comments, quoted in the text, remain timelessly valid.

[20] For this reason, *Helvering* v. *Powers*, 293 U.S. 214 (1934) is inapposite. *Powers* was written 48 years ago when public transportation was in its formative stage and mass transit as we know it today did not exist. Just as the provision of water passed from the private sector into an essential governmental service in *Brush*, transit has become a vital service provided almost exclusively by the States as an "integral part[ ] of their governmental activities," *National League*, 426 U.S. at 854 n.18, and as a "service which their citizens require," *id.* at 847. The States provide transit as a matter of public necessity rather than by choice, and they clearly are not "running . . . a business enterprise" or conducting a "business activit[y] which [has] as [its] aim the production of revenues in excess of costs," *City of Lafayette* v. *Louisiana Power and Light Co.*, 435 U.S. 389, 418 n.1, 424 (1978) (Chief Justice Burger, concurring). *See also Reeves, Inc.* v. *Stake*, 447 U.S. 429, 449-52 (1980, dissenting opinion) (noting distinction between the " 'State as government and the State as trader,' " *id.* at 450). To compare the street railway in *Powers* as it existed in 1934 with modern taxpayer-subsidized transit services that urban residents demand as an indispensible governmental service is tantamount to comparing the automobile with the horse and buggy.

[21] Of the 6,914 airports in the United State open to the public, 2,649 are privately owned and 4,265 are publicly owned. *National Airport System Plan 1978-1987* at 2 tab. 1-2 (U.S. Dep't of Transp., FAA 1978).

plied." *Id.* Then, while the suit was pending, it converted to a public benefit corporation "apparently believing that the change would eliminate Railway Labor Act coverage and bring the employees under the unbrella of the Taylor Law." *Id.* at 1352. This Court apparently gave substantial weight to the foregoing soliloquy in finding that it can "hardly be maintained that application of the [RLA] to the State's operation of the Railroad is likely to impair the State's ability to fulfill its role in the Union or to endanger the 'separate and independent existence' referred to in *National League*. . . ." *Id.* at 1356.

Unlike the Long Island Railroad's acceptance of the RLA (thirteen years without challenge!), SAMTA has never accepted FLSA coverage of its operations.[22] In fact, when the Deputy Wage and Hour Administrator issued his September 17, 1979 ruling finding local transit to be constitutionally within the FLSA, SAMTA promptly brought this action for a judgment declaring the FLSA to be inapplicable.

A similar record exists with SATS. As the two notices to employees referenced on pages 15-16 of Garcia's jurisdictional statement disclose, SATS complied with the FLSA's overtime requirements for its operators only during the hiatus between the amendments' effective date and a date shortly after the *National League* decision. Such compliance was compelled by this Court's decision in *Maryland* v. *Wirtz*, *supra*. However, even then there was only brief compliance with the FLSA requirement that overtime be paid for hours over forty since repeal of the overtime exemption for transit operators did not take full effect until May 1, 1976.

F. Partial Funding of Local Mass Transit by the Government Is Irrelevant.

In their jurisdictional statements (Government pp. 9, 15-17; Garcia pp. 13, 23-24), appellants challenge *National League* immunity on the ground that funds provided under the Urban Mass Transportation

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[22] The Government's counterclaim (¶¶ 5 & 6) asserts that since February 4, 1978, SAMTA has violated and is violating the FLSA.

Act ("UMTA"), 49 U.S.C. § 1601, *et seq.* (1976 & Supp. III 1979) allegedly hastened the public takeover of transit systems. This argument flies in the face of *National League* and principles of federalism and constitutes a convoluted attempt to apply Spending Power arguments in a Commerce Clause case.

Initially, it should be noted that neither the City of San Antonio nor SAMTA received one cent of federal assistance in acquiring the local transit operations in San Antonio. The City acquired the San Antonio Transit Company's assets in 1959, five years *before* federal operating or capital grants were available. SAMTA acquired SATS' equipment and facilities in 1978 through the issuance of bonds payable only out of local revenues — not out of federally provided funds. Thus, appellants' argument has no applicability whatsoever to SAMTA or its predecessor.

Even if SAMTA's or SATS' creation had been a product of federal funds, this would be irrelevant. First, local government's use of federal funds to acquire transit operations as a necessary step to ensure that this essential local service can continue is not materially different from federal subsidization of other existing local government activities that would end or be severely curtailed without federal involvement. Significantly, substantial federal funds, in excess of those provided for transit, have been made available to state and local governments for activities specifically exempted in *National League*. For example, between 1956 and 1977, $17.1 billion in federal grants were made for the construction of water treatment facilities. *Funding for the Municipal Wastewater Facilities Construction Grants Program: Hearings on S.57 Before Subcomm. on Environmental Pollution of the Senate Comm. on Environment & Public Works*, 95th Cong., 1st Sess. 136 (1977) (statement of John T. Rhett, Deputy Ass't Adm. for Water Program Operations, EPA). This is almost fifty percent more than the $13 billion in federal aid to transit which the Government (jurisdictional statement p. 15) asserts were made by 1978. An example of an activity specifically exempted in *National League*, which was essentially created as a result of federal funding, is solid waste management (sanitation). According to *State Activities in Solid Waste Management, 1974* (EPA, Office of Solid Waste Management Programs 1975), "[m]ost of the State programs in solid

waste management originated only within the past decade, under the stimuli of Federal planning grants and technical assistance authorized by the Solid Waste Disposal Act of 1965." Moreover, the federal government recently expressly criticized excessive "Federal interference" in "local decisions" regarding transit "wage rates," which "are better left to local decision makers." *Budget Details 1983* at 121. The appellants' argument thus is in irreconcilable conflict with current government thinking about transit.

Secondly, in arguing that UMTA grants affect transit's *National League* immunity, appellants are really making a Spending Power argument in a Commerce Clause case. This difference was explicitly recognized in *National League*. 426 U.S. at 852 n.17. The Court obviously did not consider federal funding relevant since the dissent pointed out that during fiscal 1977 the President's proposed budget recommended $60.5 billion in assistance to the States, including $716 million for law enforcement assistance. *Id.* at 878. [23]

Even if *National League* immunity could turn on Spending Power concepts, the appellants' argument would fail since the receipt of UMTA funds is in no way tied to FLSA compliance. The invalidity of their position is exposed when one considers section 13(c) of UMTA, 49 U.S.C. § 1609(c) (1976), which conditions the grant of federal

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[23] During fiscal 1980, over $445 million in federal grants were made to local governments and private entities and individuals in Bexar County. This included approximately $6.4 million in construction grants for wastewater treatment works, $.9 million for parks and recreation, $44.6 million for education, $96.8 million for health and human services, $47.9 million for housing and urban development; $23.6 million for comprehensive employment and training programs, $2 million for airports, $9.5 million for UMTA capital and formula grants, and $15.8 million for revenue sharing. *Geographic Distribution of Federal Funds in Texas* 17-20 (Community Services Administration 1980). In fiscal 1981, federal aid to Texas and its political subdivisions was $4.15 billion. *Federal Aid to States Fiscal Year 1981* at 1 (Dep't of the Treasury, Fiscal Service-Bureau of Gov't Fin. Operations, Div. of Gov't Accounts & Reports (1982)). This sum included approximately $297 million for elementary and secondary education, *id.* at 7; $126 million for construction of wastewater treatment works, *id.* at 9; $714 million for medical assistance, *id.* at 11; $14 million for law enforcement assistance, *id.* at 16; $32 million for airport and airway trust fund, *id.* at 18; $76 million for UMTA assistance, *id.* at 20; and $247 million in general revenue sharing, *id.* at 21.

funds on assurances of fair and equitable arrangements to protect the interests of employees affected by UMTA assistance. [24] Nothing in section 13(c), or in any other section of UMTA, requires the payment of overtime compensation. Section 13(c) requires that the terms and conditions of the protective arrangements be specified in the contract granting UMTA assistance. Thus, in order for UMTA assistance to precipitate an overtime pay requirement, the 13(c) contract must specifically require the payment of overtime.

Significantly, nothing in the 13(c) assurances between SAMTA and the Government (attached as Exhibit N to the Government's main brief below) obligates SAMTA to pay FLSA overtime compensation to its workers. Rather, they merely require that the rights, privileges and benefits of SAMTA's employees under the existing working conditions and practices and policies be preserved and continued. *Id.* at 2 ¶ (3). They also state (*id.*) that "[u]nless otherwise provided, nothing in these arrangements shall be deemed to restrict any rights the Recipient may otherwise have to direct the working forces and manage its business as it deems best, in accordance with the working conditions." Section 9(d) of UMTA (49 U.S.C. § 1608(d) (Supp. III 1979)) prohibits use of UMTA provisions to "regulate in any manner the mode of operation of any mass transportation system" receiving a section 1602 grant except to require compliance with "undertakings furnished . . . in connection with the application for the grant." Since there is nothing in UMTA or the 13(c) assurances requiring FLSA overtime, such as would support a Spending Power theory of liability, the appellants cannot compel FLSA compliance under the guise of the Commerce Clause. *See also Pennhurst State School & Hospital* v. *Halderman*, 101 S. Ct. 1531, 1539-40 (1981):

> [L]egislation enacted pursuant to the Spending Power is much in the nature of a contract: in return for federal funds, the States

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[24] Federal laws providing federal financial assistance in areas exempted by the Court contain similar provisions conditioning assistance on "fair and equitable arrangements . . . to protect the interests of employees": Juvenile Justice & Delinquency Prevention Act of 1974, 42 U.S.C.A. § 5633(a)(18) (West Supp. 1982); Public Health Service Act (as amended in 1979), 42 U.S.C. §§ 246(g)(2)(D)(iv)(II) and 300*-12(c)(1) (Supp. III 1979); Developmentally Disabled Assistance & Bill of Rights Act, 42 U.S.C. § 6063(b)(7)(B) (Supp. III 1979).

> agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the Spending Power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." . . . There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal monies, it must do so unambiguously. . . . By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

II. UNDER *NATIONAL LEAGUE*, THE MINIMUM WAGE AND OVERTIME PROVISIONS OF THE FLSA CANNOT BE APPLIED TO ANY STATE OR LOCAL GOVERNMENT EMPLOYEES ABSENT CONGRESSIONAL ENACTMENT OF A CONSTITUTIONALLY VALID AMENDMENT [25]

It is evident that the necessary result of the *National League* decision is to remove the great majority of state and local government employees from the minimum wage and overtime provisions of the FLSA. It is equally evident that extension of the FLSA amendments only to public employees not excluded by the *National League* holding would result in judicial reformulation of the amendments to add words of limitation (codifying the Court's "traditional governmental function" holding) where none presently exist. For these reasons, the FLSA amendments cannot be applied to any state or local government employees unless Congress passes a new, constitutionally valid amendment.

Although the FLSA has a separability clause (29 U.S.C. § 219 (1976)), a review of applicable Supreme Court decisions shows that such a clause does not permit a court to add words to a statute in order to make it constitutional and, moreover, does not authorize the application of a statute, which has been held unconstitutional as to a

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[25] This question was pled and briefed in the proceeding below, but the district court did not pass on its validity. The Court may consider that issue since "an appeal under 28 U.S.C. § 1252 brings the 'whole case' before the Court." *Fusari* v. *Steinberg*, 419 U.S. 379, 387 n.13 (1975); *accord*, *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 419 (1977).

majority of the class it was intended to cover, to the remainder of the class, thereby creating a program different from the one Congress actually adopted.

In *Hill* v. *Wallace*, 259 U.S. 44 (1922), the Court held certain provisions in the Future Trading Act to be unconstitutional under the Tenth Amendment. Although that Act contained a separability clause virtually indistinguishable from the one in the FLSA, the Court held that it could not through judicial amendment rewrite the Act to make it constitutional:

> Section 11 did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court. In *United States* v. *Reese*, 92 U.S. 214, 23 L.ed. 563, presenting a similar question as to a criminal statute, Chief Justice Waite said (p. 221):
>
> > "We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. *The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there* . . . To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."
>
> . . . .
>
> To be sure in the cases cited there was no saving provision like § 11, and undoubtedly such a provision furnishes assurance to courts that they may properly sustain separate sections or provisions of a partly invalid act without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part. *But it does not give the court power to amend the act*. [259 U.S. at 70-71 (emphasis added)]

Section 203(d) of the FLSA (29 U.S.C. § 203(d) (1976)) defines "employer" as including a "public agency." Section 203(x) defines this latter term as meaning, among other things, "the government of a State or political subdivision thereof" and "any agency of . . . a State, or a political subdivision of a State." In order to make these definitions constitutionally valid under *National League*, a court would have to reframe the definition to add words of limitation such as, "to

the extent they are not performing integral operations in areas of traditional governmental functions." Under the rationale of *Hill* v. *Wallace*, a court cannot do this notwithstanding the presence of a separability clause. *See also United States* v. *Jackson*, 390 U.S. 570, 585 n.27 (1968) ("[b]ut whatever relevance such an explicit clause [providing for severability] might have in creating a presumption of severability, . . . the ultimate determination of severability will rarely turn on the presence or absence of such a clause").

In *Sloan* v. *Lemon*, 413 U.S. 825 (1973), a three-judge district court had declared a Pennsylvania statute, which provided for the reimbursement of funds for nonpublic education, to violate the First Amendment's establishment clause because it applied to sectarian schools. Although the state law contained a separability clause, the court declined to sever out sectarian schools because "so substantial a majority of the law's designated beneficiaries were affiliated with religious organizations, it could not be assumed that the state legislature would have passed the law to aid only those attending the relatively few nonsectarian schools." *Id.* at 834. The Court was asked to declare the provision separable and allow tuition reimbursement for parents of children attending schools that were not church-related. The Court declined the invitation:

> The statute nowhere sets up this suggested dichotomy between sectarian and nonsectarian schools, and to approve such a distinction here would be to create a program quite different from the one the legislature actually adopted. . . . [*Id.* at 834.]

Recently, in *Brockett* v. *Spokane Arcades, Inc.*, 102 S. Ct. 557 (1981), the Court affirmed the Ninth Circuit's decision (631 F.2d 135 (1980)) that the unconstitutionality of injunction and closing order provisions of a Washington moral nuisance law required invalidation of the entire statute despite the presence of a separability clause. The court of appeals had held that the elimination of a vital part of the statutory scheme would eviscerate the statute and create a program quite different from the one actually adopted, relying on *Sloan*, *supra*. The court held that the separability clause did not authorize it to indulge in major revisions to salvage the statute. The Supreme Court affirmed by memorandum.

The *National League* case withdraws from FLSA coverage a major part of the class of public employees which Congress intended to include. As in the *Sloan* case, the statute herein sets up no dichotomy between traditional and nontraditional governmental functions, and therefore to reframe the statute to incorporate such a distinction would "create a program quite different from the one [Congress] actually adopted." *Id. See also Meek* v. *Pittenger*, 421 U.S. 349, 371 n.21 (1975).

CONCLUSION

SAMTA respectfully submits that the appellants present no substantial question for decision by this Court, and that the judgment of the district court should be summarily affirmed.

Respectfully submitted,

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No. 81-1728

In the Supreme Court of the United States

OCTOBER TERM, 1981

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
ET AL.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS

REPLY MEMORANDUM FOR THE APPELLANT

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In our Jurisdictional Statement, we explained that, by holding the Fair Labor Standards Act unconstitutional as applied to publicly owned transit systems, the district court extended the doctrine of intergovernmental immunity enunciated in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), by placing beyond the reach of reasonable federal commerce power legislation an activity that is not within the range of traditional governmental functions. We also noted that the recent shift to public ownership of transit systems is attributable in substantial degree to the availability of federal funds for this purpose, and observed that, by entering the field of mass transportation, the states and their subdivisions have chosen to enter a field of commerce already subject to substantial federal regulatory legislation. In response each appellee has filed an extensive

motion to affirm. But the matters raised in the motions to affirm, which essentially quarrel with our characterization of the history of the transit industry and the respective roles of the federal and local governments therein, are in no event grounds for summary affirmance. On the contrary, the motions to affirm confirm that the question presented is both legally substantial and of general importance and that this case merits this Court's plenary consideration. Accordingly, we do not join issue further with appellees at this time; their contentions are adequately addressed in our Jurisdictional Statement. We take this opportunity, however, to note two relevant decisions rendered subsequent to filing of the Jurisdictional Statement and to address the alternative ground for affirmance tendered by each appellee.

1. One week after filing of the Jurisdictional Statement, this Court rendered its decision in *United Transportation Union* v. *Long Island R.R.*, No. 80-1925 (Mar. 24, 1982), holding that the application of the Railway Labor Act to vest employees of a state owned commuter railroad with the right to strike denied them by state law does not violate the constitutional doctrine of intergovernmental immunity. Acknowledging that some railroads—predominantly passenger carriers—have passed into the public sector in recent years, the Court nonetheless held that because "operation of railroads is not among the functions *traditionally* performed by state and local governments," federal "regulation of state-owned railroads simply does not impair a State's ability to function as a State." Slip op. 7. As we explain in the Jurisdictional Statement (at 10-13) examination of the history of the mass transit industry in the United States similarly reveals that private operation was traditionally the rule.[1] Accordingly, the decision below is at odds with this Court's decision in *United Transportation Union*.

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[1] Appellee American Public Transit Association notes (Mot. to Aff. 4 n.2) that the federal government's brief in *United Transportation Union*

To be sure, as appellees observe (APTA Mot. to Aff. 13; SAMTA Mot. to Aff. 17), the Court in *United Transportation Union* cautioned that "emphasis on traditional government functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation." Slip op. 8. But the Court explained that a historical standard was given primacy because it was central to the fundamental "inquiry into whether the federal regulation affects basic State prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.' " *Ibid.*, quoting *National League of Cities* v. *Usery, supra*, 426 U.S. at 851. And even if the sphere of protected state functions may expand under certain circumstances, the Court made clear that "there is no justification for a rule which would allow the States, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation." *United Transportation Union* v. *Long Island R.R., supra*, slip op. 8. That, as we explain in the Jurisdictional Statement (at 17-19), is precisely the effect of the judgment of the court below.

As we noted in the Jurisdictional Statement (at 9 n.14), the question presented in this case has been presented for decision to three courts of appeals. Subsequent to the filing of the Jurisdictional Statement and this Court's decision in *United Transportation Union*, the Third Circuit rendered a decision in *Kramer* v. *New Castle Area Transit Authority*,

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undertook to distinguish the Long Island Railroad from conventional mass transit systems in certain respects. Nothing said there, however, supports the decision of the district court below. In any event, the Court did not rely on any of these differences in its decision in *United Transportation Union*.

No. 81-2223 (Apr. 30, 1982), holding that the doctrine of intergovernmental immunity does not preclude application of the overtime pay provisions of the Fair Labor Standards Act to employees of a publicly owned and operated transit system.[2] Relying upon this Court's decision in *United Transportation Union*, the court of appeals reviewed the history of the transit industry, which, the court found, was traditionally located in the private sector, and the role of the federal government in prompting the recent shift toward public operation, and concluded that "[t]here is * * * no tradition of states *qua* states providing mass transportation." *Kramer* v. *New Castle Area Transit Authority, supra*, slip op. 6.[3] Again, echoing *United Transportation Union*, the court of appeals added (*ibid.*):

> Moreover, since it is undisputed that the national government can set the employment relations in the area of mass transit, it would be unjustified to allow the

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[2]Appellee APTA's statement (Mot. to Aff. 14-15) that "[a]ll lower courts save two" have held the FLSA unconstitutional as applied to public mass transit employees is scarcely a fair reflection of the state of the law. Appellee cites only two federal district court decisions in accord with the decision below. Moreover, one of the two "errant" decisions buried in APTA's footnote is the decision of the Third Circuit—the only court of appeals to have decided this question, and the only court to have addressed it subsequent to *United Transportation Union*—which is squarely contrary to the decision below.

[3]The court explained in *Kramer* (slip op. 5-6; emphasis in original):

> The whole move away from private transit systems and into public systems was started and effected by the federal government which provided the financial support to allow the changeover to public transportation companies. Moreover the federal government has, through the matching funds programs, maintained an intimate involvement with the operation of such public systems. The result has been a network of publicly run systems which are cooperations between the federal government and the state. The tradition that has evolved encompasses not only state involvement in local mass transportation but also an important federal role in the matter. The [employer] cannot recast this development as one in

states, by acquiring functions previously performed by the private sector, to erode federal authority in this area.

In light of this Court's decision in *United Transportation Union* and the Third Circuit's decision in *Kramer*, which conflicts with the decision below, appellees' suggestion that this case does not warrant plenary consideration is frivolous.

2. Both appellees suggest an alternative ground for affirmance that was not reached by the court below: Congress' failure to amend the FLSA subsequent to the Court's decision in *National League of Cities* so as to limit its application in conformity with the Court's decision. Even if correct, this alternative contention would not support summary affirmance of the decision of the district court holding an Act of Congress unconstitutional. In any event, appellees' contention has no merit. First, on remand in *National League of Cities*, the three-judge court held that in view of the unusually broad severability clause in the

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which the states took over transit services on their own while the federal government only provided *post hoc* financial assistance. Massive state involvement with mass transit was *created* by the national government and the states are precluded from claiming, at this late date, that mass transit is a service which they traditionally provide.

The court of appeals rejected the suggestion that private mass transit has become economically unmanageable and that provision of transit has accordingly become essential to state sovereignty, explaining (*id.* at 6 n.1):

> [The employer's] argument * * * goes to the determination of the "public vs. private" nature of local mass transit, it does not go to the "state vs. federal" nature of governmental involvement. What the [employer], at best, shows is that government must shoulder the burden abandoned by the private sector. This does not answer the federalism issue before us, i.e., whether local transportation services are traditional *state* functions immunized from federal regulation by the tenth amendment.

FLSA, 29 U.S.C. 219, Congress did intend that the Act be enforced as to public employees to the extent permissible under this Court's decision. *National League of Cities* v. *Marshall*, 429 F. Supp. 703, 705 (D.D.C. 1977). That decision is clearly correct, for the severability clause is unequivocal in this respect (29 U.S.C. 219; emphasis added):

> *If* any provision of this chapter or *the application of such provision to any person or circumstances is held invalid* the remainder of this chapter and *the application of such provision to other persons or circumstances shall not be affected thereby.*

Congress' intention to apply the provisions of the FLSA to employees of public transit agencies, notwithstanding the constitutional limits on its power to afford such coverage to some other classes of public employees, is especially clear, because (as explained in the Jurisdictional Statement (at 2-4)), coverage under certain provisions of the FLSA was afforded to public transit employees in 1966, prior to the general expansion of coverage to most public employees in 1974. Moreover, appellees' entire argument rests upon a false premise, for in *National League of Cities* v. *Usery, supra*, this Court did not hold any provision of the FLSA unconstitutional on its face, but merely held the 1974 amendments to the Act unconstitutional as applied in certain circumstances. 426 U.S. at 852. ("We hold that *insofar as* the challenged amendments operate to directly displace the states' freedom to structure integral operations in areas of traditional government functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3" (emphasis added; footnote omitted).) Thus, this Court's decision clearly contemplated that the FLSA would remain enforceable in all other circumstances.

In any event, even if, as appellee SAMTA incorrectly suggests (Mot. to Aff. 26), the Court had held Section 203(d) of the Act unconstitutional on its face insofar as the statutory term "employer" is defined to include a "public agency," the result would be no different. Even without this language public transit employees were specifically subjected to the coverage of the FLSA, both before and after enactment of the 1974 amendments. See 29 U.S.C. 203(r)(2); 29 U.S.C. (1970 ed.) 203(d) and (r)(2). And the extension of overtime coverage to operating employees of public transit companies effected by the 1974 amendments was accomplished by provisions of those amendments that were not at issue in *National League of Cities* v. *Usery* (see J.S. 2-4). Thus, there is no basis for appellees' suggestion that application of the FLSA to their employees would require the Court judicially to amend the Act.

For the foregoing reasons and the reasons stated in the Jurisdictional Statement, probable jurisdiction should be noted.

Respectfully submitted.

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